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C3-90-1628
STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Gordon Leroy Hanson,

Appellant.

APPELLANT'S BRIEF

Statement of Procedural History

July 27, 1989	Complaint filed against appellant in Roseau County, Minnesota, charging him with possessing and manufacturing marijuana, both felonies (Minn. Stat. §§152.01, subd. 7, 9; 152.02, subd. 2(3); 152.09, subd. 1(1), (2); 152.15, subd. 1(3)(ii), 2(2)).
October 9, 1989	Appellant files various pretrial motions including, inter alia, a motion to dismiss the complaint on the grounds that Minnesota Statutes Section 152.09, subdivisions 1(1) and 1(2) are unconstitutional as applied to appellant.
November 3, 1989	Pursuant to Minnesota Rule of Criminal Procedure 9.02, appellant notifies respondent of his intent to raise the defense of medical necessity.
November 13, 1989	Omnibus hearing conducted before the Honorable Dennis J. Murphy.
January 4, 1990	Respondent files a motion to exclude appellant's noticed defense on the grounds that the defense of medical necessity does not exist in Minnesota.

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March 2, 1990	Appellant files a memorandum in opposition to respondent's motion to exclude the defense of medical necessity.
March 8, 1990	Judge Murphy enters an order granting respondent's motion to exclude the defense of medical necessity.
March 13, 1990	Appellant files a motion, accompanied by a supporting memorandum, for reconsideration of Judge Murphy's March 8, 1990 order.
March 15, 1990	Judge Murphy enters an amended order granting respondent's motion to exclude the defense of medical necessity.
March 16, 1990	Evidentiary hearing on appellant's motion for reconsideration conducted before Judge Murphy.
March 26, 1990	Appellant files his affidavit in support of his motion for reconsideration.
April 6, 1990	Judge Murphy enters an order sustaining his previous orders excluding the defense of medical necessity.
June 22, 1990	Proceeding pursuant to State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980), Judge Murphy finds appellant guilty of possessing and manufacturing marijuana and sentences appellant to serve one year and one day in the custody of the commissioner of corrections. Judge Murphy, however, stays the execution of that sentence for a period of five years, placing appellant on probation, on the following conditions: (1) appellant serve six months in the Roseau County jail; (2) appellant pay a fine, surcharge and law library fee totalling $557.50; and (3) appellant remain law abiding and follow all terms and conditions of his probation. Judge Murphy also stays appellant's six month jail sentence pending appeal.

Statement of Issues

I. WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO EXCLUDE THE DEFENSE OF MEDICAL NECESSITY ON THE GROUNDS THAT THE DEFENSE DOES NOT EXIST IN MINNESOTA, IN VIOLATION OF THE MINNESOTA OR FEDERAL CONSTITUTION OR BOTH.

The trial court ruled that the defense of medical necessity does not exist in Minnesota.

II. WHETHER THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY DESPITE HIS NECESSITY DEFENSE.

The trial court ruled that appellant was guilty of possessing and manufacturing marijuana.

III. WHETHER MINNESOTA STATUTES SECTION 152.09, SUBDIVISIONS 1(1) AND 1(2), AS APPLIED TO APPELLANT, VIOLATE HIS FUNDAMENTAL RIGHTS TO PRIVACY, PERSONAL AUTONOMY, DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS, UNDER THE MINNESOTA OR FEDERAL CONSTITUTION OR BOTH.

The trial court did not rule on this issue.

Statement of the Case

Appellant, Gordon Hanson, was charged in Roseau County District Court with possessing and manufacturing marijuana. He was tried and convicted before the Honorable Dennis J. Murphy, without a jury, pursuant to State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980)(authorizing procedure under which defendant enters not guilty plea, waives jury trial, stipulates to facts alleged in complaint and preserves right to appeal conviction), after Judge Murphy had denied Mr. Hanson's motion to suppress illegally seized evidence, and granted the State's motion to exclude the defense of medical necessity on the grounds that the defense does not exist in Minnesota.

Judge Murphy sentenced Mr. Hanson to one year and one day, but stayed execution for five years, placing Mr. Hanson on probation, on the conditions that he serve six months in jail, and pay a fine, surcharge and law library fee of $557.50. Mr. Hanson's six month jail sentence was stayed pending appeal.

Statement of Facts

A. The Appellant's Epilepsy

Gordon Hanson, 52, has spent the past 34 years struggling to live a normal life despite his medical condition (A. 2, 9).[1] On a November morning in 1956, the 18-year-old Hanson awoke in a cold sweat (A. 6-7). Huddled around his bed, Mr. Hanson's family was confused and concerned by his convulsions they had just witnessed, and rushed him to a physician, who diagnosed epilepsy (A. 7-8). Since then his epilepsy has manifested itself in both grand and petit mal seizures (A. 9, 13). His grand mal seizures typically last three to five minutes, with uncontrollable muscle spasms and a complete loss of consciousness, typically followed by confusion and disorientation, intense physical exhaustion, aching muscles, pain and days of severe depression (A. 14-15). During these grand mal seizures, he has sustained numerous serious injuries, including a broken jaw and burns to his feet

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[1] "A. x" refers to paragraphs in the Affidavit of Gordon Leroy Hanson filed in support of his motion for reconsideration on March 26, 1990.

requiring amputation of a toe (A. 16-18). Mr. Hanson has endured more than 100 grand mal seizures (A. 19).

He has also suffered several hundred petit mal seizures which commence with absolutely no warning and last one to three minutes, during which time he loses consciousness, typically followed by disorientation and several hours of severe depression (A. 20-23).

Mr. Hanson's inability to predict the seizures precludes him from venturing out in public (A. 24-25). Beyond fearing the injuries he might sustain if he had a seizure in public, he fears the embarassment and humiliation since many people view his seizure as a sign of mental illness (A. 26). Epilepsy has also caused him considerable difficulty in securing and maintaining employment (A. 11).

Mr. Hanson has received frequent treatment at the Beaudette, Warroad, Roseau, Winnipeg, Grand Forks and University of Minnesota Clinics (A. 27). Doctors have prescribed numerous medications including phenobarbital, mysoline, dilantin, tranxene and valium, but these caused delterious side effects including extreme drowsiness, moodiness, behavioral changes, irritability, difficulty thinking and severe depression (A. 28-29).

These side effects almost destroyed Mr. Hanson's family (A. 30). He and his wife found it necessary to obtain marital counseling and, on several occasions, his children either ran away from home or were removed by county authorities (A. 30).

B. Dr. Reed Recommends Marijuana, Which Appellant Uses Successfully

Around 1975 Mr. Hanson consulted Dr. Reed, a psychologist and marriage counselor, who told him that his domestic problems stemmed from the side effects of the medications, and told him that marijuana had been used medicinally to control epilepsy (A. 31-32; O.T. 93).[2] The doctor suggested that Mr. Hanson attempt to wean himself from his prescriptive medications by supplementing them with marijuana (A. 32; O.T. 93).

Before following this unexpected advice, Mr. Hanson independently researched whether marijuana actually had been used in treating epilepsy and discovered that marijuana could, in fact, be medically useful in controlling both the frequency and severity of epileptic seizures (A. 33-35; O.T. 93). He therefore believed that marijuana might assist him, as his experimentation subsequently corroborated (A. 36-37). With marijuana, Mr. Hanson gradually reduced his dependence on prescribed drugs, suffered fewer adverse side effects, and significantly decreased both the frequency and severity of seizures (A. 38-40).

Before 1975, he was taking three phenobarbital, three mysoline and three dilantin daily, but with marijuana within three years he reduced these to one phenobarbital, two dilantin and two mysoline daily (A. 41-42.).

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[2] "O.T. x" refers to pages in the November 13, 1989 omnibus hearing transcript.

C. Mrs. Hanson's Near-Tragedy With Phenobarbital

In 1978 Mr. Hanson's wife mistook his phenobarbital for aspirin and suffered a near fatal overdose which rendered her comatose and hospitalized for three days (A. 43). Mr. Hanson vowed he would never again allow phenobarbital in his home (A. 44). Yet, when he abruptly stopped taking phenobarbital he found it necessary to increase his medicinal use of marijuana (A. 45). After his wife's overdose, he continued to diminish his dependence on prescribed drugs, and the severity and frequency of his seizures continued to decrease (A. 46-47).

D. The 1982 Prosecution, Incarceration and Deterioration

In 1982 Hanson was convicted of manufacturing and possessing marijuana and sentenced to serve two months in jail (A. 48-49). While incarcerated Hanson was unable to supplement his prescriptive medications with marijuana and, consequently, he experienced a dramatic increase in the frequency and severity of his epileptic seizures, as well as the return of the prescribed drugs' adverse side effects (A. 50-51).

Upon being released, he continued to grow and use marijuana for medicinal purposes, knowing this could result in revocation of probation (A. 52). He took this risk because he believed, and continues to believe, that it is medically necessary to use marijuana to control his seizures and avoid the terrible side effects of prescriptive drugs (A. 53, 70-72, 80).

E. The Expert Medical Evidence of the Unique Benefits of Marijuana

The expert medical testimony of Dr. David Rosenbaum corroborated Mr. Hanson's belief that marijuana controlled his epilepsy more effectively than any of the prescribed medications. (A. 70-72, 80). A neurologist specializing in the treatment of epilepsy, Dr. Rosenbaum reviewed medical records from 1956 to 1989, which confirmed Mr. Hanson suffered deleterious side effects associated with the drugs prescribed (E.T. 7-12, 16-20).[3] Those records also revealed the marked decrease in the frequency of Hanson's grand mal seizures while using marijuana (E.T. 21-22).

Dr. Rosenbaum searched the medical literature concerning marijuana for controlling epileptic seizures and concluded marijuana could be useful in controlling epileptic seizures (E.T. 22-30). The medical records also led him to conclude that Mr. Hanson had successfully used marijuana to control his epileptic seizures, and he testified that if marijuana were legal he would prescribe it to Mr. Hanson (E.T. 30-32).

F. Mr. Hanson's Openness To Authorities About His Use of Marijuana

That marijuana has controlled the epilepsy more effectively than the drugs prescribed is also corroborated by his long history of being open and honest about his medicinal use of

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[3]"E.T. x" refers to pages in the March 16, 1990 evidentiary hearing transcript.

marijuana (A. 74). Beginning thirteen years before his arrest in this case, he wrote letters to local newspapers proclaiming his medicinal use of marijuana and sent similar letters to elected officials and organizations (A. 75, 77-79). Medical records indicate that he also disclosed this to his physicians (E.T. 31).

The Roseau County Sheriff verified Mr. Hanson always talked about his use of marijuana to control his epilepsy and law enforcement authorities were aware he had been growing and using marijuana for eight to nine years (O.T. 16, 24, 30). When he was arrested in 1982 he told the police he used it for medicinal purposes (O.T. 30). After his arrest in the instant case, he again told officers he used the marijuana to control his epilepsy (O.T. 31, 69, 106, 108).

During a 45 minute statement at the Roseau County jail, Mr. Hanson discussed extensively his medicinal use of marijuana and the adverse side effects of his medications (O.T. 56-58). According to the sheriff, between 15 and 20 times during those 45 minutes Mr. Hanson said he used marijuana for medicinal purposes (O.T. 58).

G. Mr. Hanson's Decision to Grow Marijuana

When he began experimenting medicinally with marijuana he purchased small amounts from various people (A. 54). After realizing the medicinal value, he began growing his own marijuana for several reasons: he did not want to contribute to the illegal trafficking of marijuana; he did not wish to risk obtaining, from untrustworthy individuals, contaminated marijuana; due to his limited \income, growing his own was the

only way he could afford the marijuana; by controlling the size of his crop, he could ensure the supply needed to control his seizures (A. 55, 56; O.T. 93).

Several years of experience taught Mr. Hanson that approximately 40 plants would yield a supply to fulfill his medical needs for one year (A. 57). In the spring of 1988 he planted his usual crop of 40 marijuana plants, but due to a severe drought the stunted yield produced a supply for only four--rather than twelve--months (A. 58-59). Consequently, during the winter of 1989, he was forced to purchase marijuana from potentially unscrupulous individuals. (A. 60).

In the spring of 1989, because of a forecast of another serious drought, he decided to triple the size of his crop to ensure an adequate supply, and Mr. Hanson planted approximately 120 plants in 1989. (A. 61-62). He explained to the sheriff this reason for his larger crop, which he intended to use only for medicinal purposes (A. 73; O.T. 27).

Summary of Argument

We shall initially examine the long history of the defense of necessity, and the widespread recognition of this ancient common law defense in other jurisdictions, as well as in Minnesota. We then focus directly on the handful of cases in which this defense has been applied to use of marijuana as a medical necessity. We then turn to the facts in the case at bar, and this will lead inescapably to the conclusion that Mr. Hanson should have been acquitted. Finally, we discuss the grave constitutional problems created by applying the proscription against marijuana to this appellant (or others in this extraordinary and profoundly troubling situation).

Since the trial court's exclusion of the medical necessity defense presents a purely legal issue, de novo review is appropriate. State v. Ford, 377 N.W.2d 62 (Minn. Ct. App. 1985). Furthermore, because this legal ruling influenced the lower court's factual findings, de novo review of its finding of guilt despite the necessity defense is similarly appropriate. State v. Continental Oil Co., 218 Minn. 123, 15 N.W.2d 542 (1944)(finding reached by applying erroneous rule of law to undisputed facts is not entitled to weight of finding of fact, but will be treated as conclusion of law), cert. denied, 323 U.S. 803 (1945). De novo review is also appropriate in the context of appellant's constitutional challenges to Minnesota Statutes Section 152.09, subdivisions 1(1) and 1(2). State v. Ford, 377 N.W.2d 62 (Minn. Ct. App. 1985)(questions of law reviewed de novo).

Argument

I. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO EXCLUDE THE DEFENSE OF MEDICAL NECESSITY ON THE GROUNDS THAT THE DEFENSE DOES NOT EXIST IN MINNESOTA, AND THEREBY VIOLATED MR. HANSON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. History and Elements of the Necessity Defense

We begin with the undisputed fact that only marijuana can best control Mr. Hanson's epilepsy--his suffering can be alleviated incalculably better by marijuana than by medical science. Affirmance here condemns Mr. Hanson to suffer for the rest of his life.

"The common law has long recognized the existence of a defense of necessity." State v. Diana, 604 P.2d 1312, 1316 (Wash. App. 1979). Although courts and commentators have debated "the specific contours of the defense," there is "substantial unanimity in the belief that such a defense exists." United States v. Randall, 104 Daily Wash. L. Rptr. 2249, 2249 (D.C. Super. Ct. 1976). See generally W. Lafave & A. Scott, Substantive Criminal Law §5.4 (1986); R. Perkins, Criminal Law 848 (1957); W. Clark & W. Marshall, Treatise on the Law of Crime 104 (4th ed. 1970); Arnolds & Garland, The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil, 65 J. Crim. L. 289 (1974); Note, Medical Necessity as a Defense to Criminal Liability: United States v. Randall, 46 Geo. Wash. L. Rev. 273 (1978).

Almost two centuries have passed since a federal circuit court acknowledged the existence of the necessity defense by eloquently observing:

> It is perhaps to be lamented that judges ever permitted themselves to make any exceptions to an act, which the legislature itself had not thought proper to incorporate within the body of it. The latitude which has been assumed in this way has very much added to the uncertainty of the written law of the land, and produced much litigation, which a firm adherence to its letter would have prevented. But it is too late for speculations of this kind. Their only use can be to make courts careful, and they cannot be too much so, never to depart, under the idea of preventing a particular hardship, from the plain and obvious meaning of the legislature. This restriction, which every judge should impose on himself, is not transcended when in the interpretation of penal statutes, any principle is applied, which is found in every code of law divine or human, and has from time immemorial been ingrafted into the common law of the country from which our jurisprudence is borrowed. Where such rules or principles exist and have invariably and on all occasions governed courts in the administration of criminal justice, they become as much a part of the law, and are as obligatory on a court as the statute which it may be called on to expound.

The William Gray, 29 F. Cas. 1300, 1302 (No. 17,694)(C.C.N.Y. 1810).

As recognized in The William Gray, the doctrine of necessity is firmly rooted in western religion and philosophy. Responding to criticism of acts violating the law of the Sabbath, Jesus declared: "What man shall there be among you, who shall have one sheep and if it falls into a pit on the Sabbath, will he not take hold of it, and lift it out? Of how much more value is a man than a sheep! So then, it is lawful to do good on the Sabbath." Matthew 12:36 (New American Standard). Likewise, defining the word "necessary" as "the avoidance of evil," Aristotle proclaimed

that a condition is a necessity whenever it is required for "either the good or living." Aristotle, Metaphysics, Book 5, §5 (H. Trendennick trans. 1952).

More recently, the District of Columbia Superior Court offered the following definition of necessity:

> Necessity is the conscious, rational act of one who is not guided by his own free will. It arises from a determination by the individual that any reasonable man in his situation would find the personal consequences of violating the law less severe than the consequences of compliance. While the act itself is voluntary in the sense that the actor consciously decides to do it, the decision is dictated by the absence of an acceptable alternative.

Randall, 104 Daily Wash. L. Rptr. at 2249-51 (footnote omitted). A Washington appellate court further defined the defense as being available "when the physical forces of nature or the pressure of circumstances cause the accused to avoid a harm which social policy deems greater than the harm resulting from the violation of the law." Diana, 604 P.2d at 1314.

The rationale for the necessity defense is found in public policy: "the law ought to promote the achievement of higher values at the expense of lesser values, and sometime the greater good for society will be accomplished by violating the literal language of the criminal law." W. LaFave & A. Scott, supra, at 629. In other words, society benefits whenever an individual chooses the lesser of two evils and thereby avoids the greater harm. Id. at 634.

The defense of necessity, therefore, is often referred to as the "choice of evils" defense. "When the pressure of circumstances presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil. Thus the evil involved in violating the terms of the criminal law (taking another's property; even taking another's life) may be less than that which would result from literal compliance with the law (starving to death; two lives lost)." Id. at 629.

The defense of necessity "justifies the defendant's conduct in violating the literal language of the criminal law and so the defendant is not guilty of the crime in question." Id. at 630. Necessity justifies "violating the law and causing harm in order to avoid a greater harm by complying with the law." Id. Such justification is based on "the belief that punishment should not be visited upon one who did not act of his own free will. Penalizing one who acted rationally to avoid a greater harm will serve neither to rehabilitate the offender nor to deter others from acting similarly when presented with similar circumstances." Randall, 104 Daily Wash. L. Rptr. at 2251.

A violation of the criminal law occurs only when prohibited conduct (the actus rea) is combined with an evil intent (the mens rea). If an individual is compelled to engage in prohibited conduct, the action is not the product of free will, and therefore not punishable. This basic principle of criminal law is equally applicable regardless of the source from which the compulsion arises. In this way, necessity is clearly related to

the defenses of insanity, self-defense and duress. It might be said it is a form of self-defense under Minnesota Statutes Section 609.06 (3), by analogy, allowing certain forms of force to avoid injury or pain to one's self.

Due to his lack of free will, an insane person is not held criminally responsible for his conduct. Likewise, intentional homicide or the infliction of bodily injury is justified when it is necessary to save the life of, or prevent bodily harm to, the defendant or another person. See W. LaFave & A. Scott, supra, at 631. An individual is also not criminally responsible for his conduct if it results from duress or coercion, such as another's threat of death or bodily injury. See United States v. Bailey, 444 U.S. 394, 409-10 (1980). Here Mr. Hanson's body, not the "perpetrator" of an assault, for example, threatens him.

As the United States Supreme Court recognized in United States v. Bailey, modern cases have tended to blur the common law distinction between the defenses of duress and necessity. Id. at 410. The Bailey Court further observed:

> Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.

Id. at 409-10 (citation omitted).

A necessity defense exists only if "the actor was reasonably compelled by circumstances to commit the proscribed act." Randall, 104 Daily Wash. L. Rptr. at 2252. See also Diana, 604 P.2d at 1316 (necessity defense available only when "physical forces of nature or the pressure of circumstances cause the accused to take unlawful action"). Although the defendant must believe that his conduct is necessary to avoid the greater harm, an honest and reasonable belief in the necessity of his action is all the law requires. See W. Lafave & A. Scott, supra, at 635. See also Nelson v. State, 597 P.2d 977 (Alaska 1979)(conduct balanced against reasonably forseeable harm, rather than harm that actually occurs).

There are three primary limitations to the necessity defense. First, "necessity cannot serve as a defense where the compelling circumstances have been brought about by the accused...." Randall, 104 Daily Wash. L. Rptr. at 2252. Second, "necessity cannot be raised where there is a less stringent alternative...." Id. Third, "the harm avoided must be more serious than that performed to escape it...." Id. The mere fact that the statute prohibiting the defendant's conduct contains no element of willfulness or voluntariness does not defeat the assertion of a necessity defense. See id. at 2253.

B. Recognition of the Necessity Defense

Anglo-American legal history offers many examples of necessity defenses. More than 250 years ago, an English court recognized that an inmate's escape from a burning prison was justified by the necessity to save his life. See 1 Hale P.C. 611 (1736). See also People v. Whipple, 279 P. 1008 (Cal. App. 1929)(same). Two centuries later, another English court held that a doctor who performed an abortion to prevent a young rape victim from suffering a nervous breakdown was not criminally responsible for unlawfully producing a miscarriage. See Rex v. Borne, 1 K.B. 687 (1939).

Federal courts in the United States have similarly found that the doctrine of necessity justified a ship docking at an embargoed port during a storm in an effort to save the crew's lives. See The Brig Struggle v. United States, 13 U.S. (9 Cranch) 71 (1815); The William Gray, 29 F. Cas. 1300 (No. 17,694) (C.C.N.Y. 1810). The doctrine of necessity also justified a mutiny by a ship's crew who forced the vessel to return to port because they reasonably believed it was not seaworthy. See United States v. Ashton, 24 F. Cas. 873 (No. 14,470)(C.C. Mass. 1834).

United States v. Bailey, 444 U.S. 394 (1980), represents the United States Supreme Court's most recent recognition of the necessity defense. The Bailey Court held that the defense of necessity is available to defendants charged with escaping from federal custody, provided they make a bona fide effort to surrender or return.

American state courts have likewise recognized the defense of necessity in a wide variety of contexts. For example, in Commonwealth v. Brooks, 99 Mass. 434 (1868), the court ruled that heavy traffic justified stopping a vehicle at a prohibited place. Necessity also was held to justify a parent's withdrawal of his child from school due to the child's feeble health, despite compulsory attendance laws. See State v. Jackson, 53 A. 1021 (N.H. 1902). According to the Iowa Supreme Court it was similarly justifiable for a person to kill a deer in violation of game laws in order to protect his property. See State v. Ward, 152 N.W. 501 (Iowa 1915). In State v. Gorham, 188 P. 457 (Wash. 1920), the court likewise ruled that speeding laws are not violated by ambulance drivers transporting people to the hospital during emergencies, or by people chasing fleeing criminals.

More recently, the Vermont Supreme Court recognized that the necessity defense was applicable to a charge of drunk driving against a woman who has on her way to a hospital emergency room after she had been severly assaulted by her husband. See State v. Shotton, 458 A.2d 1105 (Vt. 1983). The defense of necessity was ruled applicable to a charge of speeding against a motorist who exceeded the speed limit in order to pass a line of cars and afford a police car the opportunity to pursue a vehicle in front of the motorist. See State v. Messler, 562 A.2d 1138 (Conn. App. 1989). In State v. Boettcher, 443 N.W.2d 1 (S.D. 1989), the South Dakota Supreme Court recognized the necessity defense to charges of burglary, assault and taking an unmarried minor child by a parent, against a woman who suspected that her child was being sexually abused by the child's paternal grandfather.

C. Recognition of the Necessity Defense in Minnesota

In State v. Johnson, 289 Minn. 196, 183 N.W.2d 541 (1971), the Minnesota Supreme Court expressly recognized the defense of necessity. Johnson represents the only reported discussion of the necessity defense by a Minnesota court. The defendant in that case was convicted of operating a snowmobile upon the shoulder of a trunk highway. He appealed his conviction claiming that the trial court erred in excluding his defense of necessity. On appeal, the defendant argued that he was justified in using a bridge to cross a waterway because the ice on the waterway was not strong enough to support his snowmobile.

Despite affirming Johnson's conviction, the Minnesota Supreme Court recognized the common law defense of necessity. Applying the necessity doctrine to the facts presented, the court concluded that Johnson's conduct was not justified by necessity because: (1) it was not done for the preservation of life; (2) the harm sought to be avoided was not immediate or physical; (3) it was not an emergency; and (4) by taking advance precautions and avoiding the use of the bridge, the proscribed conduct could have been avoided. 183 N.W.2d at 544-45.

In a line of analagous cases, Minnesota has recognized the "claim of right" defense, where otherwise criminal conduct (such as theft or assault) may be justified by the accused's claim of right to the property which is the subject of the alleged crime. See State v. Brame, 61 Minn. 101, 63 N.W. 250 (1895); State v. Ray, 390 N.W.2d 843 (Minn. Ct. App. 1986).

D. Defense of Medical Necessity to Charges of Growing or Possessing Marijuana

1. Recognition of the Medical Necessity Defense

The doctrine of necessity arose from the recognized inability of legislatures to predict the extraordinary circumstances that justify certain conduct violating the letter of the law. This lack of predictability inherent in the necessity context, therefore, requires a flexible application, which permits the necessity doctrine to evolve over time and thereby fulfill its purpose of ensuring that the spirit of the law is not defeated by the legislature's inability to envision these emergencies. The defense of medical necessity simply represents one of the natural, inevitable and logical evolutions of this organic doctrine and, because of the consequences and relatively small price society pays, an important and desireable one. See generally Note, Medical Necessity as a Defense to Criminal Liability: United States v. Randall, 46 Geo. Wash. L. Rev. 273 (1978). Accordingly, several courts have recognized the availability of a medical necessity defense to charges of growing and possessing marijuana.

a. United States v. Randall

United States v. Randall, 104 Wash. Daily L. Rptr. 2249 (D.C. Super. Ct. 1976), is the first reported opinion recognizing a medical necessity defense to marijuana charges. Randall admitted growing marijuana, intended for his personal consumption as a result of medical necessity, and was permitted to testify

that he suffered from glaucoma (an eye disease which can potentially lead to blindness) and received some relief by smoking marijuana.

Despite the ineffectiveness of traditional treatments, Randall did not inform his opthamologist of his marijuana use until after he was arrested. He subsequently participated in an experimental program which indicated that marijuana had a beneficial effect on his glaucoma. The court ruled that Randall had established a necessity defense and, therefore, found him not guilty.

The Randall court recognized three elements to the defense of medical necessity. First, the accused did not bring about the medical condition which caused him to use marijuana. Id. at 2252-53. Second, the relief obtained by use of marijuana could not be obtained by a licit alternative. Id. Third, the evil caused by the use of marijuana was less heinous than the harm he sought to avoid. Id.

b. State v. Mussika

Less than two years ago, a Florida court followed Randall in another case involving glaucoma. See State v. Mussika, 14 Fla. L.W. 1 (Fla. Cir. Ct. 1988). As in Randall, the defendant was acquitted of marijuana charges on her medical necessity defense. Analogizing to the law of self-defense, the Mussika court observed that medical necessity constitutes a type of self-defense against a general legal prohibition, adherence to which may cause physical harm not intended by the legislature. Id. at 3.

The Mussika court adopted the following standards for the defense. First, a genuine medical disorder must exist. Id. Second, the defendant must not have been responsible for causing the disorder. Id. Third, the decision to grow and use marijuana must be genuinely and reasonably tailored to minimize the effects of the medical condition. Id. Fourth, the benefits derived from the marijuana must outweigh the harm sought to be prevented by the legislative prohibition. Id.

c. State v. Diana

A Washington appellate court recognized the right of a person suffering from multiple sclerosis to a medical necessity defense to a charge of possessing marijuana. See State v. Diana, 604 P.2d 1312 (Wash. App. 1979). See also State v. Palmer, 637 P.2d 239, 240 n.1 (Wash. 1981)(citing Diana with approval). The defendant in Diana used marijuana to treat his multiple sclerosis. Although he failed to raise the defense at trial, on appeal the defendant proposed to prove the following on remand: (1) he used marijuana because his prescriptive drugs had unpleasant side effects and were not as effective in treating his symptoms; (2) medical research supported his experience; and (3) he was unable to obtain marijuana legally through physicians. 604 P.2d at 1315.

Remanding the case to the trial court for a determination of whether a medical necessity existed, the Washington appellate court declared: "If the court determines by a preponderance of the evidence that the defendant's actions were justified by medical necessity, the conviction should be set aside." Id. at

1317. On remand, the trial court found Diana not guilty on the basis of his medical necessity defense. See State v. Tate, 477 A.2d 462, 467 n.1 (N.J. Super. Ct. 1984).

The Diana court established the following guidelines. First, the defendant must have reasonably believed that his use of marijuana was necessary to minimize the effects of his medical condition. 604 P.2d at 1317. Second, no drug is as effective as marijuana for that purpose. Id. Third, the benefits derived from the marijuana outweigh the harm sought to be prevented by the prohibition. Id.

d. State v. Bachman

In State v. Bachman, 595 P.2d 287 (Hawaii 1979), the Hawaii Supreme Court recognized the medical necessity defense to a marijuana possession charge. The brief opinion in Bachman fails to identify what medical condition was asserted. The court simply noted that the defendant's failure to present any medical testimony at trial precluded his ability to raise the issue on appeal. Id. at 288. Accordingly, the Bachman court affirmed the defendant's conviction for possessing marijuana.

e. Queen v. Parker

Recently, in Queen v. Parker, a Canadian case with striking factual similarities to the case at bar, a person suffering from epilepsy raised a medical necessity defense to a charge of possessing marijuana. On December 15, 1987, the Provincial Court in Brampton, Ontario found Parker not guilty on the basis of medical necessity. The Attorney General of Canada appealed and,

on November 17, 1988, the District Court of Ontario dismissed the appeal, upholding the trial court's conclusion that Parker's epilepsy justified his use of marijuana.

f. State v. Tate

One other reported case of medical necessity as defense to a marijuana possession charge involved a defendant who suffered from quadriplegia. Based on an informant's tip that Michael Tate was selling narcotics from his parents' home to high school students, the police obtained a search warrant and seized a large amount of marijuana, a scale, paraphernalia and money. He was originally charged with possessing marijuana with intent to distribute, but subsequently indicted only for simple possession.

Tate notified the prosecution that he intended to rely upon the statutory defense of "justification," based upon his medical condition, asserting that his use of marijuana provided relief to his quadriplegia. The prosecutor moved to strike the defense, contending that a claim of medical necessity was outside the ambit of the statutorily codified defense of justification, and that the defense was precluded by Tate's failure to seek a prescription under New Jersey's Controlled Dangerous Substances Therapeutic Research Act.

The trial court denied the motion to strike the defense. See State v. Tate, 477 A.2d 462 (N.J. Super. Ct. 1984). The decision was affirmed by an intermediate appellate court. See State v. Tate, 486 A.2d 1281 (N.J. App. 1985). The New Jersey Supreme Court, however, by the slimmest of margins (4 to 3) and over vigorous dissents, reversed the trial court's decision. See State v. Tate, 505 A.2d 941 (N.J. 1986).

The Tate majority's conclusion that the quadriplegic defendant could not claim medical necessity as a defense to marijuana charges was based primarily upon its strict construction of a statute defining the defense of justification. That statute provided:

> Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

N.J. Stat. Ann. §2C:3-2(a). According to the majority, the purpose underlying the New Jersey Penal Code was a "broad and sweeping codification" of the common law development of criminal law, which would shift the responsibility for defining the scope of former common law defenses from the courts to the legislature, and remove any judicial discretion in defining the scope of such defenses. 505 A.2d at 943. The legislative history of the revised Penal Code indicated that Section 2C:3-2(a) was intended to define the legitimate scope of the justification defense. Id.

Applying that statute to the facts presented, the Tate majority concluded that the defendant failed to satisfy all three criteria. Id. at 944. The majority first observed that the legislature's classification of marijuana as a Schedule I controlled substance constituted its specific rejection of any potential medical use for marijuana. Id. The Tate majority further observed that in defining the offense of possessing marijuana, the legislature created a medical necessity exception

by prohibiting the possession of controlled substances only when the possessor does not have a valid prescription. Id. at 944-45. Because Tate had no prescription for marijuana, he was precluded from asserting the justification defense. Id. at 945. Finally, the majority noted that the legislature's purpose in enacting New Jersey's Therapeutic Research Act was to exclude a medical necessity defense to those who fail to obtain a permit under that act for using controlled substances. Id.

Based on this analysis, the Tate majority concluded that the legislature had specifically contemplated the medical necessity defense, provided a specific exception dealing with medical necessity, and intended to exclude the defense in all other circumstances. Id. The statute, therefore, precluded Tate's justification defense and prevented the court from considering the common law defense of necessity. Id.

The majority's analysis in Tate is wholly inapplicable to the case at bar. Unlike New Jersey, there is no Minnesota statute defining the common law defense of necessity, and Minnesota's prohibition of controlled substances does not contain an exception for a valid prescription; in fact, Minnesota physicians cannot legally prescribe Schedule I controlled substances. See Minn. Stat. §§152.11, 152.12. Moreover, unlike its New Jersey counterpart, the scope of the Minnesota Therapeutic Research Act is limited to qualified cancer patients receiving chemotherapy. See id. §152.21. These critical distinctions render the Tate majority's analysis inapplicable to the instant case.

2. Principles of the Medical Necessity Doctrine

Although most early decisions involved circumstances posing a threat to the defendant's life, "later decisions recognized the applicability of the defense to acts prompted by a fear of deteriorating health." Note, Medical Necessity As a Defense to Criminal Liability: United States v.Randall, 46 Geo. Wash. L. Rev. 273, 281 (1978). The ancient common law necessity defense requirement that the circumstances threatened the defendant with immediate harm does not apply to medical necessity cases. As one commentator observed:

> If a progressive disease threatens health, preventive action need not wait until the disease reaches an advanced state. In medical necessity cases, the immediacy requirement must yield to the reality that many medical conditions are arrested either when initially detected or not at all. Incipient medical conditions thus justify conduct under a theory of medical necessity.

Id. at 290 (footnote omitted).

Justice Handler, one of the dissenting justices in State v. Tate, similarly recognized that "in certain circumstances [where] a progressive disease threatens health, preventive action need not wait until the disease reaches an advanced state." 505 A.2d at 955. Consequently, a medical necessity defense "may be applicable to acts prompted primarily by a reasonable fear of deteriorating health." Id. The defense applies equally "to a continuing condition as well as to an isolated incident." Id.

The medical necessity defense requires a balancing of the accused's interest in using marijuana against the governmental interest in prohibiting its use in each particular case. Examining that governmental interest, the Randall court commented:

> One of the oldest recognized drugs, marijuana was not regulated in the United States until the Pure Food and Drug Act of 1906, which required that the presence of marijuana be indicated on the labels of products of which it was a component. The modern prohibition began in 1937, in response to primarily economic pressures without significant inquiry into its effects on users. More recently, the 1970 Controlled Substances Act continued the prohibition of the use of marijuana, but a Presidential Commission was appointed to study its effects....
>
> Medical evidence suggests that the prohibition is not well founded. Reports from the President's Commission and the Department of Health, Education and Welfare have concluded that there is no conclusive scientific evidence of any harm attendant upon the use of marijuana. According to the most recent HEW study, research has failed to establish any substantial physical or mental impairment caused by marijuana. Reports of chromosome damage, reduced immunity to disease, and psychosis are unconfirmed; actual evidence is to the contrary. Furthermore, unlike the so-called hard drugs, marijuana does not generally appear to be physically addictive or to cause the user to develop a tolerance, requiring more and more of the drug for the same effects. The current HEW report also notes the possibility of valid medical uses for this drug.

104 Daily Wash. L. Rptr. at 2252 (footnotes omitted).

It is against this minimal governmental interest that an individual's fundamental right to protect his health must be weighed. As recognized in Randall, "[t]he right of an individual to protect his body has been weighed by several courts against the interests of the government in guarding the health and morals of the general public." Id. at 2252-53. Among the most significant cases in which this balancing occurred were Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179

(1973), invalidating prohibitions of abortions, which "stressed the fundamental nature of an individual to preserve and control her body...." Randall, 104 Daily Wash. L. Rptr. at 2253.

The right to protect one's body has also been recognized in the context of the government's prohibition of laetrile. See, e.g., Rutherford v. United States, 399 F. Supp. 1208 (W.D. Okla. 1975). The Rutherford court concluded that the Food and Drug Administration's ban against administering laetrile to cancer patients denied freedom of choice for treatment to alleviate or cure their cancer, and thereby deprived them of their life, liberty or property. The significance of the abortion and laetrile decisions "lies in the revelation of how far-reaching is the right of an individual to preserve his health and bodily integrity." Randall, 104 Daily Wash. L. Rptr. at 2253.

In balancing these competing interests, the Randall court determined that the harm Randall sought to avoid (potential blindness) outweighed the harm of growing and using marijuana. Id. The court observed that: (1) no adverse effects of using marijuana had been demonstrated; (2) Randall's use of marijuana would not harm innocent third parties; (3) any adverse effects from the marijuana would be suffered by Randall alone; and (4) by growing his own marijuana, Randall was not contributing to the illegal trafficking in this drug. Id.

The dissenting opinions in Tate provide additional guidance in balancing the competing individual and governmental interests. Justice Handler observed:

> Society clearly has a compelling interest grounded upon universal, humanitarian impulses in not having an individual suffer needlessly. The sever, debilitating consequences inherent in the personal plight of a quadriplegic's recurring violent, spastic contractions summon the compassion of the community. The relief of such individual suffering takes on greater social significance than the societal benefits to be derived from imposing criminal sanctions upon the afflicted individual for his or her possession of marijuana.

505 A.2d at 957. Justice Garibaldi likewise commented:

> The State's purpose in prohibiting the use of marijuana generally is not furthered by prohibiting the use of marijuana in certain exceptional cases--for example, by denying a cancer victim relief from excruciating pain, a glaucoma victim a chance to preserve his or her sight, or a quadriplegic or multiple sclerosis victim relief from continuous recurring spastic contractions. In such cases, marijuana is the only medical treatment that ameliorates the condition or relieves the pain without deleterious side effects.

Id.

The cases also impose certain procedureal requirements to raising a medical necessity defense. For example, according to the Diana court, medical testimony is required to corroborate a defendant's assertion that he reasonably believed his use of marijuana was necessary to protect his health. 604 P.2d at 1317. The trial court in Tate similarly "ruled that a defendant who seeks to assert medical necessity as a justification defense must demonstrate by competent evidence that he has a medically recognized condition, that his condition is life- or sense-threatening, that the use of an illicit substance ameliorates the condition or relieves the pain, and that no

legal, prescribable substance can provide similar relief without deleterious side effects." Tate, 505 A.2d at 953-54 (Handler, J., dissenting). The Bachman court also required a showing by competent medical testimony of the beneficial effects of marijuana use upon the defendant's condition, as well as the ineffectiveness of prescriptive medications. 595 P.2d at 288.

The courts have also required the defendant to prove the medical necessity defense by a preponderance of the evidence. See Randall, 104 Daily Wash. L. Rptr. at 2254; Mussika, 14 Fla. L.W. at 3; Diana, 604 P.2d at 1317. See also Tate, 505 A.2d at 955 (Handler, J., dissenting).

These procedural requirements will limit the impact of the medical necessity defense to relatively few charges of marijuana possession. As Justice Handler observed, these "[s]trict and workable standards governing the application of this defense can eliminate the risk of its abuse while at the same time accomodate the special individual situation deserving of the defense." Id. at 953. The Randall court assessed the limited impact of the medical necessity defense:

> Recognition by the Court of this defense will not have the effect of nullifying the statute. Medical necessity is difficult to demonstrate, and would not be available to a sufficiently large number of those accused that it would support wholesale use of marijuana. Objective standards of proof can be developed without undue hardship, since the existence of a disease and its response to the drug can be demonstrated scientifically. In addition, permitting this limited use of marijuana, a drug with no demonstrably harmful effects, will not endanger the general public in the way that herion might.

104 Daily Wash. L. Rptr. at 2254

In any case, the fear that the defense of medical necessity may be abused does not justify the refusal to recognize the defense in appropriate cases. If this were so, the defenses of self-defense, duress and insanity would not be recognized. The fear that a defense may be abused justifies the creation of procedural requirements to prevent its abuse; it does not justify rejecting the defense entirely.

E. Exclusion of the Medical Necessity Defense in the Case at Bar

In response to Mr. Hanson's disclosure of his intention to raise the defense of medical necessity, the prosecutor filed a motion to exclude the defense "on the grounds that no such defense exists in the State of Minnesota...." Appellant filed a 25 page memorandum in opposition to this motion. Six days later the trial court entered an order granting the prosecutor's motion. This order was amended solely to indicate that the basis for the prosecutor's motion was "that the defense of medical necessity is unavailable as a matter of law in Minnesota and [that both parties had] stipulated that no factual issues exist for purposes of this motion and it was a legal decision."

The two page memorandum attached to the trial court's orders reveals that the court concluded that the defense does not exist in Minnesota as a matter of law. This was clearly erroneous in light of the Minnesota Supreme Court's explicit recognition of the general necessity defense in State v. Johnson, 289 Minn. 196, 183 N.W.2d 541 (1971). See supra p.20. The specific defense of medical necessity is merely a natural,

inevitable and logical evolution of the inherently flexible necessity doctrine. See supra p. 21. Moreover, the trial court's conclusion is contrary to the overwhelming weight of authority from other jurisdictions. See supra pp. 21-25.

The trial court, therefore, clearly erred in excluding the medical necessity defense on the grounds that it does not exist in Minnesota.

F. The Minnesota Constitution and the Court's Power to Do Justice

Article I, Section 8 of the Minnesota Constitution provides generally: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person...." The Minnesota Supreme Court has often recognized its power to do justice in individual cases, with or without resort to the constitution, and despite statutes to the contrary. See In re Arbitration - Minnesota Airports Commission, 443 N.W.2d 519 (Minn. 1989); In re Kirby, 350 N.W.2d 344, 348 (Minn. 1984); State v. C.A., 304 N.W.2d 353 (Minn. 1981); In re Greathouse, 189 Minn. 51, 248 N.W. 735 (1933). Federal law allows even prison inmates, irrespective of their crimes, to have medical treatment. Estelle v. Gamble, 429 U.S. 97 (1976). States, of course, can provide greater (but not less) protection to individual rights than the federal constitution does. See State v. Oman, 261 Minn. 10, 110 N.W.2d 514, 522 (1961); Fleming & Nordby, The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mists", 7 Hamline L. Rev. 51 (1984).

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The court has "inherent power" to do justice "whether any previous form of remedy has been granted or not." In re Petition for Integration of the Bar, 216 Minn. 195, 12 N.W.2d 515 (1943). This case presents an opportunity for the court to do justice in an unusual, even unique case, and to display a compassion which the law does not often enough yield. Thus, although we believe the more narrow grounds urged earlier in this argument are the proper basis for the decision here, these more expansive notions of the power and duty to do justice guide us to the same conclusion.

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II. THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY DESPITE HIS NECESSITY DEFENSE.

Mr. Hanson immediately moved the court to reconsider its ruling excluding the necessity defense. An evidentiary hearing was conducted, at which testimony of three expert witnesses was presented. Due to extraordinarily inclement weather, with the prosecutor's assent, the court permitted Mr. Hanson to testify by way of affidavit. Despite the unrebutted testimony of Mr. Hanson and his three expert witnesses, the court affirmed its previous ruling. The parties proceeded pursuant to State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980), without a jury on the record already made, and the lower court found him guilty.

A careful review of the evidence shows Mr. Hanson sustained his burden of demonstrating a medical necessity defense. Indeed, if he did not, there can truly be no such defense in Minnesota, for rarely if ever will a more compelling case appear.

A medical necessity defense requires the accused to show a genuine medical disoreder. See State v. Mussika, 14 Fla. L.W. 1, 3 (Fla. Cir. Ct. 1988). See also State v. Tate, 505 A.2d 941, 953-54 (N.J. 1986)(Handler, J., dissenting)(life-threatening or sense-threatening condition). Mr. Hanson undisputedly is afflicted with epilepsy, a serious sense-threatening medical disorder. The accused must not have caused this medical condition. See United States v. Randall, 104 Wash. Daily L. Rptr. 2249, 2252-53 (D.C. Super. Ct. 1976); Mussika, 14 Fla. L.W. at 3. It is not and cannot be contended that Mr. Hanson caused his epilepsy.

He must demonstrate he reasonably believed marijuana was necessary to minimize the effects of his condition. See State v. Diana, 604 P.2d 1312, 1317 (Wash. App. 1979). Mr. Hanson's belief that marijuana was necessary to control his epileptic seizures was based initially upon the advice of a psychologist and his independent research, and his experimentation with marijuana over several years corroborated this.

This belief must be corroborated by medical testimony. See Diana, 604 P.2d at 1317. Dr. David Rosenbaum, a neurologist specializing in the treatment of epilepsy (what better expert could there be?), confirmed that marijuana was necessary to alleviate Mr. Hanson's epilepsy.

The decision to use marijuana must have been genuinely and reasonably tailored to minimize the effects of his medical condition. See Mussika, 14 Fla. L.W. at 3. The sincerity of Mr. Hanson's belief is demonstrated by his long history of being open and honest about his medicinal use of marijuana, which clearly was reasonably tailored to controlling the frequency and severity of his seizures, as well as avoiding the delerterious side effects from his prescriptive medications.

He must show that his use of marijuana ameliorates the effects of his medical condition. See Tate, 505 A.2d at 953-54 (Handler, J., dissenting). Medical testimony must corroborate these beneficial effects. See State v. Bachman, 595 P.2d 287, 288 (Hawaii 1979). The record reveals that Mr. Hanson

successfully decreased the frequency and severity of his epileptic seizures and avoided the adverse side effects of his prescribed drugs, and Dr. Rosenbaum corroborated these points.

The accused must also demonstrate that no licit alternative available to him was as effective as marijuana in minimizing the effects of his medical condition without deleterious side effects. See Randall, 104 Wash. Daily L. Rptr. at 2252-53; Tate, 505 A.2d at 953-54 (Handler, J., dissenting); Diana, 604 p.2d at 1317. The ineffectiveness of prescriptive medications must also be corroborated by medical testimony. See Bachman, 595 P.2d at 288. The record reveals that the medications prescribed over the years were not as effective as marijuana in controlling the frequency and severity of Mr. Hanson's epileptic seizures, and unlike marijuana, these alternatives caused serious adverse side effects. His inability to obtain similar relief from the medications was also corroborated by the testimony of Dr. Rosenbaum.

Benefits derived by marijuana must be shown to outweigh the harm sought to be prevented by the legislative prohibition against its use. See Randall, 104 Wash. L. Rptr. at 2252-53; Mussika, 14 Fla. L.W. at 3; Diana, 604 P.2d at 1317. The benefits Mr. Hanson derived consisted of both a significant reduction of the frequency and severity of his epileptic seizures, and an elimination of the serious side effects from his prescriptive medications. Benefits such as these overwhelmingly outweigh the minimal governmental interests in prohibiting someone like Gordon Hanson from using marijuana for legitimate

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medicinal purposes. See supra pp. 28-31. It need not be shown the interest in generally restricting marijuana is less than the benefits, since no plenary legalization is sought.

Finally, recognition that it was medically necessary for a person afflicted with epilepsy to use marijuana is not without precedent. As we have noted, a Canadian appellate court recently upheld an acquittal on the basis of medical necessity of an epileptic charged with possessing marijuana. See supra pp. 24-25. And, in addition to the expert testimony presented in the case at bar, widespread medical research demonstrates the therapeutic value of treating epilepsy with marijuana. See e.g., National Organization for the Reform of Marijuana Laws v. Drug Enforcement Administration, 559 F.2d 735, 749 (D.C. Cir. 1977); HEW Fifth Annual Report to the U.S. Congress, Marijuana and Health 117-27 (1975); Horowitz, Marijuana Derivative Reported to Curb Epilepsy in First Trial, Medical Tribune, Jan. 14, 1981, at 10; Consroe, Wood & Buchsbaum, Anticonvulsant Nature of Marijuana Smoking, 235 J.A.M.A. 306 (1975).

Failure to recognize Gordon Hanson's medical necessity defense would create a paradoxical injustice. The defense of necessity would be available in a murder case, but not in a case merely involving charges of marijuana possession. Minnesota physicians can legally prescribe dangerous drugs such as cocaine and morphine, but anomalously cannot prescribe marijuana--a relatively harmless drug. Gordon Hanson finds himself in an intolerable position where, to treat his epilepsy, he is forced

by the law to use dangerous, highly addictive, mood altering drugs (such as phenobarbital, valium, tranxene, dilantin and mycilin), but cannot obtain relief from marijuana--a far less harmful drug which, unlike prescriptive medications, does not cause deleterious side effects. Mr. Hanson should be encouraged and commended, rather than prosecuted, for reducing his reliance on these dangerous medications, which he did after a doctor suggested it.

The case at bar presents this court with a very easy, albeit unusual case of necessity. Compared to heroin or LSD, for example, marijuana is a relatively harmless drug, and has a demonstrable, medically accepted therapeutic value in treating epilepsy. Society has nothing to fear from Mr. Hanson's use of marijuana. By growing his own, he was not contributing to the illegal traffic, and any adverse effects from his use of marijuana would be suffered by Hanson alone; no innocent third parties would be harmed.

This case represents nothing more than the natural, logical and inevitable evolution of the law and of medicine. The law, especially the doctrine of necessity, must remain an organic creature. If it is to survive, the law must continue to grow and to change with the times. This is the essence of the common law and, is an exemplary way, of the necessity defense. Long-established principles require that we recognize Gordon Hanson's medical necessity to use marijuana in his struggle to live a more normal life than would otherwise be possible because of his epilepsy.

III. MINNESOTA STATUTES SECTION 152.09, SUBDIVISIONS 1(1) AND 1(2), AS APPLIED TO APPELLANT, VIOLATE HIS FUNDAMENTAL RIGHTS TO PRIVACY, PERSONAL AUTONOMY, DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS, UNDER THE MINNESOTA AND FEDERAL CONSTITUTIONS.

The Minnesota proscription against marijuana, as applied to the unique circumstances in this case, violates Mr. Hanson's fundamental rights to privacy, personal autonomy, due process of law and the equal protection of the laws, as guaranteed by the fourth, ninth and fourteenth amendments to the United States Constitution, and article I, sections 7, 8, 10 and 16 of the Minnesota Constitution.

In Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), invalidating prohibitions of abortions, the Supreme Court recognized the fundamental right of individuals to control and preserve their bodies. See United States v. Randall, 104 Daily Wash. L. Rptr. 2249, 2253 (D.C. Super. Ct. 1976). This right to protect one's health has also been recognized in the context of the government's prohibition of laetrile. See, e.g., Rutherford v. United States, 399 F. Supp. 1208 (W.D. Okla. 1975). The Rutherford court concluded that the ban against laetrile denied cancer patients their freedom of choice for treatment, and thereby deprived them of their life, liberty or property. The significance of the abortion and laetrile decisions "lies in the revelation of how far-reaching is the right of an individual to preserve his health and bodily integrity." Randall, 104 Daily Wash. L. Rptr. at 2253.

Like the federal government's ban against laetrile, Minnesota's prosecution of Gordon Hanson for limited use of marijuana to alleviate his epilepsy unreasonably denies him his freedom to pursue the medical treatment which is most effective for him. The prosecution impermissibly infringes upon his fundamental right to protect his body from the scourge of epileptic seizures, and in these unique medical circumstances, violates his constitutionally protected rights to privacy, personal autonomy and due process of law.

As a Florida court recently commented in State v. Mussika, a medical necessity case involving a defendant suffering form glaucoma:

> [T]he absolute prohibition against marijuana's use, even when such use may be therapeutically required to avoid grave and irreversible injury, appears on its face to be irrational. Such a sweeping, indiscriminate prohibition is not well founded.
>
> Surely the Florida legislature, when it embraced such a total prohibition, could not have foreseen the possibility that a socially abused substance like marijuana might prove to be of critical medical value to patients confronting life-threatening and sense-threatening diseases.
>
> In our haste to rightfully prosecute those who profit from the social trafficking and sale of illicit drugs we cannot become blind to the legitimate medical needs of those who are afflicted by incurable diseases and require appropriate medical care. To ignore the plight of such people renders the law callous to the most basic of all human rights: the right of self-preservation.
>
> . . .

> There is a pressing need for a more compassionate, humane law which clearly discriminates between the criminal conduct of those who socially abuse chemicals and the legitimate medical needs of seriously ill patients whose welfare and very lives may depend on the prudent therapeutic use of those very same chemical substances.

State v. Mussika, 14 Fla. L.W. 1, 4 (Fla. Cir. Ct. 1988).

This prosecution also violates Mr. Hanson's right to equal protection of the laws. The Minnesota prohibition against the use of schedule I controlled substances specifically does not apply to the use of peyote (a schedule I controlled substance, like marijuana) "in bona fide religious ceremonies of the American Indian Church...." Minn. Stat. §152.02, subd. 2(4) (1988). Thus, the statute expressly exempts from criminal prosecution the use of a schedule I controlled substance for religious purposes.

Yet, there is no constitutional hierarchy which ranks the right to exercise freely one's religion as superior to the fundamental privacy right of personal autonomy or self-preservation. Consequently, by failing to exempt the medicinal use of marijuana to preserve one's health, the legislature has unconstitutionally and very selectively afforded religious freedoms greater protection of the laws. This disparate treatment of coequal constitutional rights clearly violates the guarantee of equal protection of the laws.

The prohibition against the use of marijuana is also unconstitutional as applied to Gordon Hanson by virtue of Minnesota's THC Therapeutic Research Act. See Minn. Stat. §152.21 (1988). That statute exempts from criminal prosecution

the medicinal use of marijuana by qualified cancer patients receiving chemotherapy. See id. at subd. 6(1). The legislature's purpose in enacting this exemption was to provide these individuals with relief from certain side effects, nausea and vomiting, typically associated with chemotherapy. See id. at subd. 1, 5(2).

By permitting only chemotherapy cancer patients to use marijuana for medicinal purposes, the Act unconstitutionally affords them greater protection of the laws than exists for persons afflicted with other medical disorders, specifically epilepsy, who suffer more deleterious side effects from their prescribed treatment programs. Consequently, the statute unreasonably and impermissibly grants chemotherapy cancer patients a greater right to personal autonomy than is possessed by those with other medical conditions who would benefit equally, if not more, from the medicinal use of marijuana. This disparate treatment of similarly situated groups of people clearly violates the guarantee of equal protection of the laws.

Conclusion

For the reasons previously discussed, Gordon Hanson respectfully requests this court to reverse his convictions for growing and possessing marijuana, and direct that he be discharged.

Respectfully submitted,

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By _____
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By _____
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Attorneys for Appellant

Dated: September 17, 1990

STATE OF MINNESOTA

COUNTY OF ROSEAU

DISTRICT COURT
NINTH JUDICIAL DISTRICT

NOTICE OF APPEAL TO
COURT OF APPEALS

STATE OF MINNESOTA,

Plaintiff,

vs.

GORDON LEROY HANSON,

Defendant.

ROSEAU COUNTY DISTRICT
COURT FILE NO. K-89-425

DATE JUDGMENT OF
CONVICTION ENTERED:
June 22, 1990

To: Clerk of Appellate Courts
230 State Capitol
St. Paul, MN 55155

Clerk of District Court
Roseau County Courthouse
206 Center Street West
Roseau, MN 56751
(218) 463-2541

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PLEASE TAKE NOTICE, that the above-named defendant hereby appeals to the Court of Appeals of the State of Minnesota from the following judgment and orders of the above-named District Court:

(1) Judgment of Conviction entered on June 22, 1990;

(2) Order granting the State's Motion to exclude the defense of medical necessity entered on March 16, 1990;

(3) Order denying defendant's Motion to Suppress evidence obtained as a result of a search and seizure entered on December 29, 1989.

Dated: July 18, 1990

Respectfully submitted,

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STATE OF MINNESOTA

IN COURT OF APPEALS

GORDON LEROY HANSON,

Appellant,

vs.

STATE OF MINNESOTA,

Respondent.

STATEMENT OF THE CASE OF APPELLANT

ROSEAU COUNTY DISTRICT COURT FILE NO. K-89-425

APPELLATE COURT CASE NUMBER:

1. Court of case origination:

Roseau County District Court

The Honorable Dennis J. Murphy

2. Jurisdictional statement:

Appeal is taken from an order entered on December 29, 1989 denying Defendant's Motion to Suppress evidence obtained as a result of a search and seizure, an Order entered on March 16, 1990 denying the State's Motion to exclude the defense of medical necessity and the judgment of conviction for the manufacture and possession of a controlled substance entered on June 22, 1990.

3. Type of litigation and designate any statutes at issue:

Criminal

Minn. Stat. §152.09, Subd. 1(1), 1(2).

4. Brief description of claims, defenses, issues litigated and result below.

Appellant pleaded not guilty to the charge, stipulated to the facts in the Complaint, and waived his right to a jury trial. The trial court convicted the appellant on both counts of the Complaint. Appellant contends that the search of his property on July 27, 1989 and the resulting seizure of evidence violated his fundamental protection against unreasonable searches and seizures. Appellant contends that Minn. Stat. §152.09, Subd. 1(1) and Subd. 1(2) both on their face and as applied, violate his fundamental rights to privacy, personal autonomy, due process and the equal protection of the laws. Appellant also contends that the trial court erred in granting state's motion to exclude the defense of medical necessity. Appellant also contends that the trial court erred in finding the appellant guilty despite his necessity defense.

5. Issues proposed to be raised on appeal.

(1) Whether the trial court erred in finding the appellant guilty despite his necessity defense.

(2) Whether the trial court erred in granting State's motion to exclude the defense of medical necessity.

(3) Whether Minn. Stat. §152.09, Subd. 1(1) and Subd. 1(2) violate, either on their face or as applied, appellant's fundamental rights to privacy, personal autonomy, due process of law and the equal protection of the laws as guaranteed by the Fourth, Ninth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 8, 10 and 16 of the Minnesota Constitution.

(4) Whether the search of appellant's property on July 27, 1989 and the resulting seizure of evidence, violated appellant's fundamental protection against unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, section 10 of the Minnesota Constitution.

6. Is a transcript required? If so, full or partial transcript?

A full transcript of all proceedings is already part of the record.

7. Is oral argument requested? If so, is argument requested at a location other than that provided in Rule 134.09 Subd. 2?

Oral argument is requested at a regular session of the court in Ramsey County.

8. Are formal briefs necessary?

Yes.

9. Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.

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Dated: July 18, 1990

A-4

STATE OF MINNESOTA

COUNTY OF ROSEAU

DISTRICT COURT
NINTH JUDICIAL DISTRICT
CRIMINAL DIVISION
COURT FILE NO. K-89-425

- - - - - - - - - - - - - - - -

State of Minnesota,

Plaintiff,

vs.

MOTION

Gordon LeRoy Hanson,

Defendant.

- - - - - - - - - - - - - - - -

TO: DEFENDANT, GORDON LEROY HANSON, AND HIS ATTORNEYS, HOWARD I. BASS, ESQ., MESHBESHER, SINGER & SPENCE:

The State respectfully moves the Court to exclude any evidence at the trial of this matter regarding the alleged defense which the defendant is terming "medical necessity" and any evidence which relates to the defendant's alleged epilepsy or alleged use of controlled substances to treat the alleged epilepsy, on the grounds that no such defense exists in the State of Minnesota, and this evidence and testimony would be irrelevant and not otherwise admissible under the Rules of Evidence of the State of Minnesota.

Dated: January 4, 1990.

Martin Bern, Esquire
Roseau County Attorney
Attorney for Plaintiff
109 2nd Street Northeast
Roseau, Minnesota 56751
(218) 463-2088
7158

A-5

STATE OF MINNESOTA
COUNTY OF ROSEAU

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Gordon LeRoy Hanson,
Defendant.

ORDER
File No. K-89-425

The above-entitled matter was submitted to the undersigned, one of the judges of the above-named court, on the motion of the State, dated January 4, 1990, to exclude the defense of medical necessity, and upon the stipulation that the defense of medical necessity is unavailable as a matter of law in Minnesota and no fact issues exist.

Mr. Martin Berg, Roseau County Attorney, argued on behalf of the State of Minnesota.

Mr. Howard Bass, Attorney at Law, Minneapolis, Minnesota, argued on behalf of the defendant.

Upon the memorandum of counsel and all of the records and file herein, the Court makes the following:

ORDER

1. The motion of the State to exclude the defense of medical necessity is GRANTED.

2. The memorandum attached hereto is made a part of this Order.

Dated this 8th day of March, 1990.

Dennis J. Murphy
Judge of District Court

MEMORANDUM

The defendant in this case claims the medical necessity for the use of marijuana for his epilepsy. In reviewing Chapter 152 of the Minnesota law, the legislature has classified marijuana as a Schedule I controlled substance. (152.02, Subd. 2(3)) The legislature has considered the medical necessity of certain controlled substances. M.S. 152.11 provides for prescriptions of Schedules II, III, IV and V controlled substances and the procedures to be followed. M.S. 152.12 allows certain medical and dental practitioners to prescribe Schedules II, III, IV and V controlled substances. There is no such provision for Schedule I controlled substances, or, specifically, marijuana.

Since the legislature did enact provisions for the medical use of certain controlled substances, they obviously considered whether marijuana could be used for medicinal purposes. In fact, in M.S. 152.21 the Minnesota legislature found that scientific literature indicated there may be promise for alleviating certain side effects of cancer chemotherapy and, as such, developed the THC Therapeutic Research Act. The legislature having considered the use of marijuana for medical purposes, and having developed a research program rather than allowing marijuana to be used for medicinal purposes, has determined, as of this date, that marijuana shall not be used for medical purposes.

The defendant in this case has a previous conviction for possession of marijuana, and upon that conviction appealed his case to the Minnesota Supreme Court. At the time of this appeal,

this defendant argued that the medical profession now recognizes that marijuana has a medicinal value and therefore classifying marijuana as a Schedule I controlled substance is unconstitutional. See State v. Hanson, 364 N.W.2d 786 (Minn. 1985). The Court denied this argument and cited United State v. Fogarty, 692 F.2d 542 (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). The Fogarty case, as cited by the Hanson case, clearly rejects any argument of the use of marijuana for medicinal purposes. This Court will not and cannot overturn the legislative decision that marijuana shall be classified as a Schedule 1 controlled substance, and at this point medical research does not indicate that it has any medicinal purpose.

DJM

jms

cc: Mr. Martin Berg
Mr. Howard Bass

STATE OF MINNESOTA
COUNTY OF ROSEAU

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Gordon LeRoy Hanson,
Defendant.

AMENDED ORDER
File No. K-89-425

The above-entitled matter was submitted to the undersigned, one of the judges of the above-named court, on the motion of the State, dated January 4, 1990, to exclude the defense of medical necessity, upon the basis that the defense of medical necessity is unavailable as a matter of law in Minnesota and both the plaintiff and defendant stipulated that no factual issues exist for purposes of this motion and it was a legal decision.

Mr. Martin Berg, Roseau County Attorney, argued on behalf of the State of Minnesota.

Mr. Howard Bass, Attorney at Law, Minneapolis, Minnesota, argued on behalf of the defendant.

Upon the memorandum of counsel and all of the records and file herein, the Court makes the following:

ORDER

1. The motion of the State to exclude the defense of medical necessity is GRANTED.

2. The memorandum attached hereto is made a part of this Order.

Dated this 15th day of March, 1990.

Dennis J. Murphy
Judge of District Court

MEMORANDUM

The defendant in this case claims the medical necessity for the use of marijuana for his epilepsy. In reviewing Chapter 152 of the Minnesota law, the legislature has classified marijuana as a Schedule I controlled substance. (152.02, Subd. 2(3)) The legislature has considered the medical necessity of certain controlled substances. M.S. 152.11 provides for prescriptions of Schedules II, III, IV and V controlled substances and the procedures to be followed. M.S. 152.12 allows certain medical and dental practitioners to prescribe Schedules II, III, IV and V controlled substances. There is no such provision for Schedule I controlled substances, or, specifically, marijuana.

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DJM

jms

cc: Mr. Martin Berg
Mr. Howard Bass

STATE OF MINNESOTA
COUNTY OF ROSEAU

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Gordon LeRoy Hanson,
Defendant.

ORDER
File No. K-89-425

The above-entitled matter came on before the undersigned, one of the judges of the above-named court, on the 23rd day of March, 1990, in the courtroom, Roseau County Courthouse, Roseau, Minnesota, upon the motion of defendant to reconsider the Court's order excluding the defense of medical necessity.

Mr. Martin Berg, Roseau County Attorney, appeared on behalf of the State of Minnesota. Mr. Howard Bass, Attorney at Law, Minneapolis, Minnesota, appeared on behalf of the defendant. Defendant appeared personally.

Upon all of the records and file herein, and the offer of proof made by the defendant, the Court makes the following:

ORDER

1. The motion of the State to exclude the defense of medical necessity is GRANTED.

2. The memorandum attached hereto is made a part of this Order.

Dated this 6th day of April, 1990.

Dennis J. Murphy
Judge of District Court

A-12

MEMORANDUM

It is still the opinion of this Court that the Minnesota legislature has considered the medical uses of marijuana and, with limited exceptions, marijuana has no medical value and therefore has been continued as a Schedule I controlled substance. Incorporated by reference is the memorandum attached to this Court's Order of March 8, 1990.

At the time of the hearing the defense brought forward three witnesses, together with the affidavit of the defendant and the exhibits attached thereto. The State informed the Court that it would not be conducting any examination, it being the State's position that an offer of proof requires only statements by the attorneys, although the State made no objection to the testimony of the proposed experts.

It is necessary for the Court to make a determination whether the offer of proof made by the defendant would be admissible at the time of trial, and if it was enough to show that medical necessity could be a defense in this matter. To accomplish this, the Court intends to review the testimony of the various witnesses called. The first witness called was Dr. David Rosenbaum, a specialist in neurology with a subspecialty in epilepsy. Dr. Rosenbaum indicated that he had reviewed the defendant's medical records and testified there were certain side effects to the drugs previously used by the defendant. He testified that there are two newer drugs on the market which have not been used by the defendant in controlling his epilepsy. These drugs are Tegretol and Depakote. Dr. Rosenbaum stated that these drugs "seem to have little, if no, affects on cognitive function, producing sedation, memory problems." (See page 18, lines 4 - 7, transcript.) He also recited certain anecdotal studies, but indicated "one can't make too much of these kind of anecdotal studies." (Page 26, lines 10 - 11.) He further went on to indicate that the THC component of marijuana is not favored as a drug to treat epilepsy. (Page 28, lines 3 - 12.) He also

testified that the cannabidiol element in marijuana is worthy of investigation for actual use as a drug in the treatment of epilepsy. (Emphasis supplied.) (Page 28, lines 20 - 23.)

In further testimony, he stated that marijuana could be useful in controlling epileptic seizures. (Emphasis supplied) (Page 30, lines 15 - 24.) However, he could not answer whether there is a cognitive impairment from THC. Dr. Rosenbaum's review of the medical records in his testimony the Court is of the opinion that defendant has available to him certain drugs that he has not used, or drugs that have not been given to him over a long enough period of time to determine their effectiveness and what, if any, side effects, there may be. Dr. Rosenbaum would not say, with reasonable medical certainty, that the use of marijuana would be a method to treat the defendant's epilepsy. (Page 34, lines 12 - 16.) The form of treatment he said he would recommend for the defendant would be monotherapy rather than using a combination of drugs. He would treat defendant with Dilantin first, then if that didn't work he would treat defendant with Tegretol, and then Depakote. (Pages 35, 36 and 37.)

In essence, Dr. Rosenbaum could only say that the cannabidiol ingredient of marijuana was worthy of investigation and could be useful in controlling epileptic seizures. From this doctor's review of the medical records and his testimony, it would appear that defendant has available to him certain drugs that he has not used or that have not been given to him over a long enough time to determine their effectiveness and what, if any, side effects there may be.

The second witness called was that of Dr. Dennis Petro, a neurologist who has worked with the FDA and large pharmaceutical corporations. He indicated that the drug Depakote has caused deaths, but in every case he could recall they have been children and not adults. (See page 43, lines 9 - 22, transcript.) Dr. Petro was asked whether cannabidiol would be useful in treating and/or controlling epileptic seizures. He indicated from one

published paper it was encouraging to a neuroscientist to further pursue the characterization of cannabidiol for epilepsy. (Emphasis supplied) (Page 55, lines 16 - 24.) Dr. Petro would not state, with any reasonable medical certainty, that the use of marijuana would be successful in controlling epileptic seizures. Dr. Petro, in addition, indicated that he had no competence to testify as to therapeutic affects of marijuana or whether it should be legalized for any reason. (Page 62, lines 21 - 25.)

He further testified as to the difficulty in getting drugs approved by the FDA. He also described the various procedures that are necessary for obtaining a license to run an experimental program.

The defense also called Mr. Robert Randall, who is one of four people with a prescription for marijuana. This prescription is for his glaucoma. The United States District Court for the District of Columbia, in United States v. Randall, found the defense of medical necessity available to Mr. Randall. In that case Mr. Randall's doctor testified that conventional medications were ineffective and that surgery, while offering some hope of preserving his vision, carried with it the risk of immediate blindness. Prior to trial, Mr. Randall also became involved in an experimental program. Mr. Randall indicates that he would required between 50 and 75 marijuana plants to supply him for a year.

The defendant did not offer medical evidence that the treatment as recommended by Dr. Rosenbaum has been used in the past. No evidence was offered indicating any monotherapy for any length of time, or that the use of Dilantin, Tegretol or Depakote would effectively treat him.

Defendant relies on the case of United States v. Randall, which was previously mentioned in this memorandum. Using the reasoning applied by the Federal District Court, the District Court found that medical necessity cannot be used to shield an

actor from criminal responsibility if: (1) the duress or circumstance has been brought about by the actor himself; (2) the same objection could have been accomplished by a less offensive alternative which was available to the actor; or (3) the evil sought to be averted was less heinous than that performed to avoid it.

In this case, requirement No. 1 is met; that is, defendant certainly did not bring on the epilepsy himself. The second requirement set out has not been met by the defendant. First, defendant has not, at least according to Dr. Rosenbaum's testimony, taken the medication for a long enough period and on a monotherapuetic basis to determine whether the Dilantin would be effective. He has also not used the two new drugs that are available, Tegretol and Depakote. Secondly, neither doctor would testify with reasonable medical certainty that marijuana would take care of the defendant's seizure problems. The words used by the doctors were "could" and "should be investigated further". Because of these reasons, the Court is not going to allow the defense of medical necessity.

More troubling to the Court is in the affidavit of the defendant for this hearing, he indicated that normally 25 to 40 plants would be enough. The testimony at the omnibus hearing indicated that he had planted 120 plants. It is defendant's claim that he planted these because of the drought conditions of the year before and the anticipated drought of 1989. The Court has great difficulty with this reasoning due to the fact that the plants were within 20 to 40 yards of defendant's house. It is this Court's belief that if this marijuana was so medically important to the defendant, he certainly would have watered these plants and there would be no need to worry about the anticipated drought.

For all of the above reasons, the Court has determined that the defense of medical necessity is not available to the defendant on this charge.

DJM

COPY

STATE OF MINNESOTA
COUNTY OF ROSEAU

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Gordon LeRoy Hanson,
Defendant.

FINDING OF GUILTY
File No. K-89-425

The above-entitled matter came on before the undersigned, one of the judges of the above-named court, on the 22nd day of June, 1990, in the courtroom of the Roseau County Courthouse, Roseau, Minnesota.

Mr. Martin Berg, Roseau County Attorney, Roseau, Minnesota, appeared on behalf of the State. Mr. Howard Bass, Attorney at Law, Minneapolis, Minnesota, appeared on behalf of the Defendant. The Defendant appeared personally.

The parties stipulated that the Court could take the discovery evidence, together with the evidence from the omnibus hearing in this matter, and make a determination of guilty or not guilty.

The Court having reviewed the discovery, together with the testimony taken at the omnibus hearing, makes the following:

FINDINGS OF FACT

1. Defendant, Gordon LeRoy Hanson, had growing in his garden at his home approximately 120 marijuana plants.

2. Defendant knew or believed that he was growing marijuana, which plants were under his possession and control.

3. This all occurred on the 27th day of July, 1989 in

Roseau County, Minnesota.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The State has proved beyond a reasonable doubt that the defendant manufactured and possessed marijuana in Roseau County, Minnesota on July 27, 1990.

From the foregoing Conclusions of Law, IT IS ADJUDGED AND DECREED:

1. That Defendant is guilty of the crime of manufacture of a controlled substance, to wit: marijuana, contrary to M.S. 152.09, Subd. 1(1); 152.02, Subd. 2(3); 152.01, Subd. 9; 152.01, Subd. 7; and 152.15, Subd. 1(3)(ii)

2. That Defendant is guilty of the crime of possession of a controlled substance, to wit: marijuana, contrary to M.S. 152.09, Subd. 1(2); 152.02, Subd. 2(3); 152.01, Subd. 9; 152.15, Subd. 2(2).

Dated this 26th day of June, 1990.

Dennis J. Murphy
Judge of District Court

jms

cc: Mr. Howard Bass
Mr. Martin Berg

THE DAILY WASHINGTON
Law Reporter
Established 1874

D.C. Superior Court

CRIMINAL LAW & PROCEDURE
Medical Necessity

Defendant is not guilty of possession of marijuana because of defense of medical necessity where he shows that ingestion of marijuana smoke had beneficial affect on his eye condition, normalizing intraocular pressure and lessening visual distortions.

UNITED STATES v. RANDALL. Super. Ct. D.C. Crim. No. 65923-75, November 24, 1976. *Opinion* per Washington, J. *John Karr* for defendant. *Richard Stolker* for United States.

WASHINGTON, J.: On August 27, 1975, defendant Robert C. Randall was arrested and charged with possession of a dangerous drug, LSD, and of a narcotic, marijuana, in violation of Sections 33-702(a)(4) and 33-402 respectively of the District of Columbia Code. Defendant moved to suppress these items as evidence, alleging that they were the fruit of an illegal search. After argument, the motion was granted with respect to the LSD, and the associated charge subsequently dismissed; the motion was denied with respect to the marijuana. An additional pre-trial request, a motion to dismiss on constitutional grounds, was withdrawn. The case came for trial by the Court on July 20 and 22, 1976, after the completion of which this matter was taken under advisement. Post trial briefs were invited, and a memorandum on behalf of the defendant was received on September 14. Having been recessed between September 17 and October 20, and after further delay occasioned by the illness of the trial judge, the Court pursuant to due deliberation and upon consideration of defendant's post trial submission, now renders this decision.

FACTS

The facts are not in dispute. The government has established, and the defendant has not attempted to refute, that on or about August 21, 1975, police officers in the course of their normal duties noticed what they believed to be cannabis plants on the rear porch and in the front windows of defendant's residence. On the basis of these observations and a field test which confirmed the presence of THC, the active ingredient of marijuana, a warrant was issued and a search of the premises conducted on August 23, 1975. Several plants and a dried substance later identified as marijuana were seized, and defendant's arrest followed.

At trial, the government's evidence demonstrated that the substance seized at defendant's residence was marijuana, possession of which is prohibited[1] by D.C. Code Section 33-402, thus establishing all the elements of the crime charged. Moreover, defendant admitted that he had grown the marijuana in question and that it was intended for his personal consumption. He further testified that he knew that possession and use of this narcotic are restricted by law.

Defendant nonetheless sought to exonerate himself through the presentation of evidence tending to show that his possession of the marijuana was the result of medical necessity. Over government objection of irrelevancy, defendant testified that he had begun experiencing visual difficulties as an undergraduate in the late 1960's. In 1972 a local ophthalmologist, Dr. Benjamin Fine, diagnosed defendant's condition as glaucoma, a disease of the eye characterized by the excessive accumulation of fluid causing increased intraocular pressure, distorted vision and, ultimately, blindness. Dr. Fine treated defendant with an array of conventional drugs, which stabilized the intraocular pressure when first introduced but became increasingly ineffective as defendant's tolerance increased. By 1974, defendant's intraocular pressure could no longer be controlled by these medicines, and the disease had progressed to the point where defendant had suffered the complete loss of sight in his right eye and considerable impairment of vision in the left.

Despite the ineffectiveness of traditional treatments, defendant during this period nonetheless achieved some relief through the inhalation of marijuana smoke. Fearing the legal consequences, defendant did not inform Dr. Fine of his discovery, but after his arrest defendant participated in an experimental program being conducted by ophthalmologist Dr. Robert Hepler under the auspices of the United States Government. Dr. Hepler testified that his examination of the defendant revealed that treatment with conventional medications was ineffective, and also that surgery, while offering some hope of preserving the vision which remained to defendant, also carried significant risks of immediate blindness. The results of the experimental program indicated that the ingestion of marijuana smoke had a beneficial effect on defendant's condition, normalizing intraocular pressure and lessening visual distortions.

OPINION

This is a case of first impression in this jurisdiction, one which raises significant issues. Consequently, the Court recognizes its responsibility to set forth clearly and in some depth its understanding of the applicable law. The legal questions presented by this case can be stated as follows:

1. Does the common law recognize the defense of necessity in criminal cases? If so, what are its parameters?
2. Have the elements of a necessity defense been established here?

These questions will be dealt with separately in the discussion which follows.

I. *Does the common law recognize the defense of necessity in criminal cases? If so, what are its parameters?*

Although the defense of necessity was seldom raised successfully at common law,[2] the existence of such a defense has been recognized by legal scholars since the turn of the twentieth century. Professor Courtney Kenny has noted, for example, that the same logic which prevents the imposition of civil liability in situations in which one has harmed the person or property of another in order to avoid a greater harm may also be applicable in certain criminal cases.[3] Similarly, Clark and Marshall in their treatise on criminal law note several situations in which the necessity defense may be raised to criminal charges.[4] This common law defense is also recognized by such legal scholars as William L. Burdick,[5] Rollin F. Perkins,[6] and M. Cherif Bassouini.[7] More recently, the necessity defense has been considered in leading law reviews,[8] in modern reference works,[9] cases,[10] the Model Penal Code and the various state laws which have been revised under its influence.[11] While a consensus has not been reached concerning the specific contours of the defense, there is substantial unanimity in the belief that such a defense exists.

As Clark and Marshall, *supra*, note:

> An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil.[12]

Necessity is the conscious, rational act of one who is not guided by his own free will. It arises from a determination by the individual that any reasonable man in his situation would find the personal consequences of violating the

(Cont'd. on p. 2251 - Necessity)

1. As noted hereinafter, marijuana is not totally prohibited under D.C. Code 33-402 *et seq.* However, in view of the federal proscription, the Court notes that marijuana cannot be possessed legally in the District of Columbia.

2. As Judge Leventhal noted in *United States v. Moore*, 486 F.2d 1139, 158 U.S. App. D.C. 375, 417 (D.C. Cir. 1973), the common law defense of necessity has been "more discussed than litigated".

3. C. Kenny, *Outlines of Criminal Law* 68-70 (1907).

4. W. Clark and W. Marshall, *Treatise on the Law of Crimes* 104 et seq. (4th ed. 1940).

5. W. Burdick, *The Law of Crime* 260 (1946).

6. R. Perkins, *Perkins on Criminal Law* 951 (2nd ed. 1969).

7. M. Bassouini, *Criminal Law and its Processes* 106 et seq. (1969).

8. See, for example, Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1274 (1974), and Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum. L. Rev. 914 (1975).

9. See, for example, 1 R. Anderson, Wharton's Criminal Law and Procedure 403-405 (1957), 21 Am Jr 2d *Criminal Law* §99.

10. Some sample cases will be discussed hereinafter.

11. Model Penal Code, §3.01 and 3.02, and Comment (Tent. Draft No. 8, 9, 10, 1958).

12. W. Clark and W. Marshall, note 4, *supra*.

TABLE OF CASES

D.C. Superior Court

A-19

NITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES MAGISTRATES' SCHEDULE FOR JANUARY, 1977

S. Magistrate LAWRENCE S. MARGOLIS

Civil trials, pretrials and motions; probation violation hearings; sentences; counsel appointments, arraignments and sub-arraignments.

S. Magistrate JEAN F. DWYER

Preliminary hearings, misdemeanor pleas, trials and sentences; civil trials, pretrials, and motions as available; Federal Reservation Sanity Hearings; traffic summons and trials; back-up Magistrate for emergency arrest and search warrants.

S. Magistrate HENRY H. KENNEDY, JR.

Bail in felony and misdemeanor cases and bail for Judges' Bench Warrants; civil trials, pretrials, and motions as available; Magistrate for arrest and search warrants including emergency night and weekend warrants; probation violation hearings and misdemeanor sentences.

BELL BOY NUMBER 626-2206

o preliminary hearings are scheduled for anuary 7th and 10th.

DISPOSITIONS

mber, Parties, Demand Amount, Action Taken and Attorneys

THE CLERK

8596-75 Knoll International, Inc. v. Yettekov Wilson, Acct., $1,510.61. Default judg., $1,420.61. aylinson & Kudysh

FAMILY DIVISION DOMESTIC RELATIONS BRANCH NEW CASES

Number, Parties, Grounds and Attorney for Plaintiff

3931-76 Sidberry, Barbara v. Lionell Dwight. Vol. Sep. A. T. Moss

3932-76 Jackson, Lonie M. v. Marcellus W. Vol. Sep. A. T. Moss

3933-76 Alabi, Jewyll R. v. Rasheed. Vol. Sep. R. W. Johnson

3934-76 Baumgardner, Cornelius v. Angela. Vol. Sep. R. C. Liotta

3935-76 Syring, David Lee v. Jean K. Vol. Sep. H. A. Calevas

3936-76 Weisberg, Paul S. v. Tamara Levin. Vol. Sep. J. W. Karr

3937-76 Matthews, Brenda R. v. John T. Vol. Sep. E. Sayles

D3938-76 Grey, Sterlon v. Patricia R. Vol. Sep. E. Sayles

D3939-76 Hall, Alma Marie v. Robt. V. Vol. Sep. J. D. Green

D3940-76 Henderson, Hunion v. Lucy. Vol. Sep. M. D. Haden

D3941-76 Savin, Charlotte L. v. L. Andrew. Vol. Sep. A. S. Clarke

D3942-76 Phillips, Ethelmae L. v. James O. Vol. Sep. R. W. Rifkin

D3943-76 Blue, Anita Y. v. Prentice Lee. Vol. Sep. J. E. Lappin

D3944-76 Sias, Willie Mae v. Joseph O. Vol. Sep. J. E. Lappin

D3945-76 Uznanski, June C. v. Henry K. T. Vol. Sep. R. H. Myers, Jr.

D3946-76 Jackson, Brenda J. v. Jerome Ray. Vol Sep. S. C. Jackson

D3947-76 Haney, Sandra L. v. Gregory F. Vol. Sep. S. H. Lang

D3948-76 Moore, Alonzo v. Sanders, Hattie. Vol. Sep. S. J. Levine

D3949-76 Moore, Alonzo v. Cantey, Lizzie Ruth. Vol. Sep. S. J. Levine

BAR ASSOCIATION OF THE D.C.

NOTICE

The REAL PROPERTY LAW COMMITTEE will hold an EAT-N-LEARN Luncheon at 12:00 noon on Wednesday, January 19, 1977. The luncheon will be held in the Board of Directors room of the Bar Association, 1819 H Street, N.W., Room 300.

Our guest will be:

LOUIS W. COYNE, President
Coyne Mortgage Associates

His topic will be:

The Availability of Money and the Role of a Mortgage Banker

All members of the bar association are welcome. For reservations please call the bar office at 223-1480.

DIXON INTRODUCES LOTTERY LEGISLATION

Councilman Arrington Dixon, D-Four, has announced his introduction of the Quick Buck and Tax Relief Act of 1976, a bill to legalize several forms of gambling, including, but not limited to bingo, numbers, on and off track betting, raffles and similar games of chance in the District.

This bill does not create a separate lottery commission as in many states, but would create a District of Columbia Lottery Administration which would be managed by an Administrator housed within the Department of Finance and Revenue. The purpose of this legislation, says Dixon, "is to provide an additional source of revenue for the District Government while providing a sound form of tax relief for District Residents."

Generally, the bill follows Maryland Lottery Law. Advised that the Maryland Lottery reached a record $2 million per week sales in September, Dixon expressed his concern that D.C. was losing thousands of dollars in possible revenue to neighboring jurisdictions.

The Director of the Department of Finance and Revenue is authorized to promulgate rules and regulations to carry out the purpose of the legislation and also delegate this authority to the Administrator of the Lottery Administration. All monies received from the gross sales of lottery tickets less the commission of authorized selling agents are placed in a special account known as the Lottery Fund. Under a scheme to be devised by the administrator, all ticket sales will be split between the District Government and the winners. Both daily and non-daily tickets are authorized to be sold, and ticket agents are directed to receive up to 5% of the purchase price of their gross sales and are also entitled to a special 1% windfall in certain cases to encourage sales.

Citing this as, "an effort to substantively address the grave and burdensome tax crisis currently facing District Residents," Dixon admits, "I realize that this does not provide the plenary answer to our tax problem, but everyone can use a 'quick buck' now and then, even the District Government."

NECESSITY

(Cont'd. from p. 2249)

law less severe than the consequences of compliance.[13] While the act itself is voluntary in the sense that the actor consciously decides to do it, the decision is dictated by the absence of an acceptable alternative. Unlike compulsion or duress, necessity arises from the press of events rather than through the imposition on the actor of the will of another person.[14]

Traditionally, the defense of necessity has been characterized as being either a justification of or an excuse for criminal activity.[15] As a justification, the concept has been used to negate the criminal nature of a prohibited activity. This position is based upon a conception of criminality as a combination of a prohibited act and an evil state of mind.[16] Where the criminal act was compelled by outside circumstances rather than through the exercise of the actor's free will, the requisite criminal intent is considered to be lacking. Thus, although the prohibited act has been committed, the elements of the crime are incomplete and the actor as well as anyone similarly situated must be relieved of criminal responsibility.

Necessity has also been seen in the law as a form of excuse. Under this view, criminal responsibility arises upon the performance of every willed action, regardless of the underlying reason for the choice.[17] The actor may be excused from punishment for public policy reasons, but not because he was without blame. Thus, although guilt is established punishment is not required because of extenuating circumstances which mitigate the seriousness of the offense. Under this theory, the necessity defense must be applied on a case by case basis rather than by reason of a general rule.

Common to both of these views is the belief that punishment should not be visited upon one who did not act of his own free will. Penalizing one who acted rationally to avoid a greater harm will serve neither to rehabilitate the offender nor to deter others from acting similarly when presented with similar circumstances. This point is implicitly recognized by the three traditional limitations on the applicability of the necessity defense. The defense will not shield an actor from criminal responsibility if:

13. C. Kenny, note 3, *supra*.

14. Three situations in which the necessity defense is not applicable should be noted. First, the defense cannot shield one who acts in violation of law out of a belief that the law is morally wrong. The constraints of one's conscience are not sufficient external circumstances for the purposes of this defense. Second, the compelling circumstances must actually exist; a mistake of fact, no matter how reasonable, defeats the defense. Thus a person who seeks the shelter of the necessity defense accepts the risk that he has perceived the situation incorrectly. Third, although it has been suggested that this aspect is ripe for change, it is still the law that necessity cannot justify the taking of an innocent human life.

15. See the discussion of justification and excuse in Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum. L. Rev. 914 (1975).

16. C. Kenny, note 3, *supra*, at p.33.

17. R. Perkins, note 6, *supra*, at p.749.

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1. The duress or circumstance has been brought about by the actor himself;
2. The same objective could have been accomplished by a less offensive alternative which was available to the actor; or
3. The evil sought to be averted was less heinous than that performed to avoid it.[18]

In brief, the necessity defense may not be raised unless the actor was reasonably compelled by circumstances to commit the proscribed act. It is unfair to excuse one who has brought the compelling situation upon himself, and it is violative of public policy to grant an exemption from punishment for behavior more detrimental to society than the consequences the actor seeks to avoid, or for behavior which is not the least offensive alternative. The application of these principles is well illustrated by the case law.

The first limitation, that necessity cannot serve as a defense where the compelling circumstances have been brought about by the accused, is a significant component of the decision in *United States v. Moore*, 486, F.2d 1139, 158 U.S. App. D.C. 375 (D.C. Cir. 1973). Appealing from a conviction in the District Court for possession of heroin in violation of two federal statutes, defendant did not dispute that the government had established all the elements of the offenses charged. Instead, he urged that because of his heroin addiction, he lacked capacity to choose to act otherwise, and therefore that his conviction should be vacated because the requisite criminal intent was absent. While none of the opinions represented a majority of the nine judges, the concurring opinions by Judge Wilkey, joined by Judges MacKinnon and Robb, and by Judge Leventhal joined by Judge McGowan, noted appellant's role in causing his addiction. Since drug dependence was a condition which the appellant had freely brought upon himself, he could not escape criminal sanctions by showing that he had been impelled by addiction to commit the prohibited acts.

The second limitation, that necessity cannot be raised where there is a less stringent alternative, was demonstrated in *Bice v. State*, 109 Ga. 117, 34 S.E. 202 (Ga., 1899). Convicted of a violation of a statute prohibiting the transporting of liquor to a church, defendant appealed, alleging, *inter alia*, medical necessity. Defendant admitted that liquor was contained in his carriage, which was parked in the vicinity of a church while he and his wife attended services, but contended that this proximity was necessary because the intoxicant was being used by his wife, for medicinal purposes pursuant to the instructions of her physician. The court noted the legal use of liquor in the treatment of such disorders as heart disease and colic but upheld the conviction, stating:

> If one should unfortunately be subject to any of these ills, he must either stay at home, or, if he wishes to provide against sudden attacks, take with him some other kind of medicine.[19]

The third limitation, that the harm avoided must be more serious than that performed to escape it, was a factor in the decision in *People v. Brown*, 70 Misc. 2d 224, 333 N.Y.S. 2d 342 (1972). Defendants, inmates at the facility known as the Tombs, had been convicted of rioting and seizing control of the prison. On appeal, the prisoners alleged that they had acted in protest of the crowded and inhumane conditions which prevailed at the facility, and that this justification should shield them from criminal penalties. The court disagreed, however, noting that the harm to society inherent in permitting this transgression among convicted criminals was more potentially damaging than their grievances.

In sum, the necessity defense has been recognized at common law as one which arises where the actor is compelled by external circumstances to perform the illegal act. Provided that the case does not fall within the scope of the three limitations, necessity constitutes a defense to criminal liability.

II. *Has necessity been established in the instant case?*

In the case at bar, defendant alleges that he is suffering from glaucoma, an incurable eye disease which results inevitably in loss of sight. While conventional medications and surgery offer little hope of improvement, defendant contends that the inhalation of marijuana smoke has a beneficial effect on his condition, relieving the symptoms and retarding the progress of the disease. Defendant therefore asserts that he should not be visited with the criminal consequences of possession of the proscribed narcotic marijuana. The Court finds upon these facts that the defendant has established the basic elements of the traditional necessity defense. It remains to consider whether he is barred from asserting it by one of the limitations.

A brief consideration reveals that of the three limitations, only the third poses any threat to this defendant's use of this defense. While the exact cause of defendant's glaucoma is unknown, neither the government nor any of the expert witnesses has suggested that the defendant is in any way responsible for his condition. Similarly, no alternative course of action would have secured the desired result through a less illegal channel. Because of defendant's tolerance, treatment with other drugs has become ineffective, and surgery offers only a slim possibility of favorable results coupled with a significant risk of immediate blindness. Neither the origin of the compelling circumstances nor the existence of a more acceptable alternative prevents the successful assertion of the necessity defense in this case.

The question of whether the evil avoided by defendant's action is less than the evil inherent in his act is more difficult. It requires a balancing of the interests of this defendant against those of the government. While defendant's wish to preserve his sight is too obvious to necessitate further comment, the government's interests require a more detailed examination.

One of the oldest recognized drugs, marijuana was not regulated in the United States until the Pure Food and Drug Act of 1906, which required that the presence of marijuana be indicated on the labels of products of which it was a component.[20] The modern prohibition began in 1937, in response to primarily economic pressures[21] without significant inquiry into its effects on users. More recently, the 1970 Controlled Substances Act[22] continued the prohibition of the use of marijuana, but a Presidential Commission was appointed to study its effects. Pending receipt of this report, marijuana was classified as a non-narcotic and although its use was still prohibited, the penalties were considerably reduced, with first offenders being discharged conditionally. The District of Columbia law, however, was not changed, and retains the narcotic classification based on the 1937 Uniform Narcotics Act.

Medical evidence suggests that the prohibition is not well founded.[23] Reports from the President's Commission and the Department of Health, Education and Welfare have concluded that there is no conclusive scientific evidence of any harm attendant upon the use of marijuana.[24] According to the most recent HEW study,[25] research has failed to establish any substantial physical or mental impairment caused by marijuana. Reports of chromosome damage, reduced immunity to disease, and psychosis are unconfirmed; actual evidence is to the contrary. Furthermore, unlike the so-called hard drugs, marijuana does not generally appear to be physically addictive or to cause the user to develop a tolerance, requiring more and more of the drug for the same effects.[26] The current HEW report also notes the possibility of valid medical uses for this drug. Both the President's Commission and HEW found the current penalties too harsh in view of the relatively inoffensive character of the drug, and recommended decriminalization. Commissions of study in other countries have reached similar conclusions,[27] and several states have taken steps in this direction.[28]

The right of an individual to protect his body has been weighed by several courts

18. C. Kenny, note 3, *supra*.

19. *Bice*, *supra*, at 203.

20. Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768.

21. Liquor manufacturers and distributors, still recovering from the effects of Prohibition, were interested in eradicating the potential competition from a drug often used for recreational purposes. Brecher, *Licit and Illicit Drugs*, (Little, Brown, 1972). In addition, criminalizing marijuana simplified the task of eliminating the competition for jobs during the Depression posed by the principal users of the drug, Mexican migrant laborers. Musto, "The Marijuana Tax Act of 1937", Arch. Gen. Psychiat., Vol. 26, Feb., 1972.

22. 21 U.S.C. *801 et seq.*

23. This observation should not be taken as a holding on the medical merits of this drug in general, an issue this Court is not called upon to decide.

24. Testimony of Director of the National Institute of Mental Health, a division of the Department of Health, Education and Welfare, at H. Rep. #91-1444 on P.L. 91-513. "First Report of the National Commission on Marijuana and Drug Abuse; Marijuana: A signal of Misunderstanding." "Second Report of the National Commission on Marijuana and Drug Abuse; Drug Use in America: Problems in Perspective."

25. HEW, "Marijuana and Health, Fifth Annual Report to the U.S. Congress," at 4-7 (1975). This document was entered in evidence as Defendant's Exhibit #1.

26. HEW, "Marijuana and Health", *supra*, note 25, at p.6.

27. See for example the Indian Hemp Drugs Commission of 1894, sponsored by the Indian and British governments, the Baroness Wooton Report of 1968 in the United Kingdom, the LeDain Report of Canada in 1970.

28. Thirty-nine states have adopted all or most of the Uniform Controlled Substances Act, which ceased the classification of marijuana as a narcotic: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia,

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ainst the interest of the government in arding the health and morals of the general blic. Most importantly, the Supreme Court ddressed this question in *Roe v. Wade*, 410 S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 79 (1973), cases which attacked the constiutionality of state statutes restricting aborions. In an opinion which stressed the ndamental nature of the right of an dividual to preserve and control her body, he Court held that abortion cannot constiutionally be denied a woman under certain ircumstances. These decisions recognize first hat a woman may at any stage end a regnancy which threatens her own existnce, her right to life being more significant han that of the fetus, however close to term. The opinions go on to affirm the prerogative of woman during the first three months of regnancy to terminate it for any reason whatoever, establishing that she may control er body at the expense of the life of a fetus ess than four months old. The significance of hese decisions to the instant case lies in the evelation of how far-reaching is the right of n individual to preserve his health and bodily ntegrity.

The federal district courts have also dealt with this problem. In *Stowe v. United States*, Civil No. 75-0218-B (W.D. Okla., August 14, 1975), plaintiffs alleged that they or their spouses suffered from cancer, and that they had been successfully treated with laetrile, a drug banned by the Food and Drug Administration on the ground that its effectiveness in the treatment of cancer is still in doubt. In an unreported interim decision, the court found that the plaintiffs right to medical treatment with a substance which had demonstrably favorable effects on their cancers superseded any interest of the government in protecting the general public from a drug whose properties were not conclusively proven. Accordingly, the FDA was enjoined from preventing the plaintiffs from importing stated quantities of laetrile for their own use. See also *Keene v. United States*, Civil No. 76-0249-H (S.D. W.Va., August 17, 1976).

Under these circumstances, the Court finds that this defendant does not fall within the third limitation to the necessity defense. The evil he sought to avert, blindness, is greater than that he performed to accomplish it, growing marijuana in his residence in violation of the District of Columbia Code. While blindness was shown by competent medical testimony to be the otherwise inevitable result of defendant's disease, no adverse effects from the smoking of marijuana have been demonstrated. Unlike the situation in *Roe* and *Doe*, no direct harm will be visited upon innocent third parties; any major ill effects from the inhalation of marijuana smoke will occur to the defendant alone. Furthermore, defendant, by growing marijuana for his own consumption, cannot be said to be contributing to the illegal trafficking in this drug, and thus injuring, however nebulously, innocent members of the public. In any event, it is unlikely that such slight, speculative and undemonstrable harm could be considered more important than defendant's right to sight.[29]

Nonetheless it may be argued that the necessity defense, because it negates the mental element of criminality, cannot shield a defendant charged under a statute which purports to punish only the act, without any specified mental state.[30] Since the philosophical justification for this defense is the unfairness and ineffectiveness of punishing one who did not act through the exercise of his unfettered discretion, its applicability where the offense charged does not involve the willful commission of an act is open to question. According to Section 33-402(a) of the District of Columbia Code:

> It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter.[31]

On its face, the statute does not admit of any defenses except those which negate the allegation that the accused committed the act. Liability appears to be absolute, to follow inexorably upon the performance of the proscribed action. The case law, however, supports an alternative view.

In *United States v. Weaver*, 458 F.2d 825, 148 U.S.App.D.C. 3 (1972), the United States Court of Appeals interpreted Section 33-402 as requiring a particular state of mind, the absence of words to this effect in the statutory language notwithstanding. There, defendant appealed from conviction of possession of narcotics in violation of section 33-402, citing the trial court's failure to instruct the jury that only a knowing possession was prohibited. Finding the jury instructions adequate, the appellate court affirmed the conviction, noting:

> Although the statute [D.C. Code Section 33-402] does not contain the term [knowingly], the offense prohibited by the law is a knowing possession of the drug.[32]

The commission of the prohibited act without the requisite mental state is not sufficient for commission of the offense. Similarly, in *McKoy v. United States*, 263 A.2d 649 (1970), defendant appealed from a conviction of possession of implements of a crime in violation of D.C. Code Section 22-3601, alleging insufficient proof of intent to use the items for criminal purposes. Affirming the conviction, the court found that while the statute prohibits only the possession of instruments generally employed in the commission of crime, the government must establish not only possession but also intent to use illegally. A mental element is implied in a statute despite its apparent imposition of criminal penalties for the mere commission of the act. See also *Rosser v. United States*, 313 A.2d 876 (1974).

In other jurisdictions, necessity has been raised successfully as a defense to statutes which contain no element of wilfulness or voluntariness. In *State v. Jackson*, 71 N.H. 552, 53 A. 1021 (1902), defendant appealed from a conviction for violation of the compulsory education law. The statute provided criminal penalties for any parent or guardian who did not send his child to school for designated portions of each year, unless absence was approved by the School Board after application and hearing. Defendant refused to allow his daughter's attendance, believing that the delicate state of her health required that she remain at home. The court held that the parent's interest in the preservation of the health of his child was superior to any interest of the state that its future citizens be educated. Recognizing the time required by the administrative process, the court held that the provision for application for permission from the School Board did not offer the accused a significant alternative. Thus, the preservation of health was deemed a valid defense to a statute which contained no requirement of voluntariness, and which appeared to bring criminal sanctions upon the mere performance of the act. See also *State v. Hall*, 74 N.H. 61, 64 A. 1102 (1906). In *Cross v. Wyoming*, 370 P.2d 371 (Wyo. 1962), the necessity defense was successfully raised to preserve property despite an absolute statutory prohibition. There the court reversed a conviction for violation of a statute providing penalties for the killing of moose out of season or without a license. Defendant, who did not deny knowledge of the absolute statutory ban, admitted killing the animals but interposed the defense of necessity. The moose, defendant alleged, were harming his land, eating forage necessary for his cattle, and frightening his family. Under these circumstances, the court held, the accused should not be criminally responsible for his violation of the statute, its absolute language notwithstanding, because the constitutional right of citizens to defend their lives and property cannot be circumvented by legislation. For similar results, see also *Brewer v. Arkansas*, 72 Ark. 145, 78 S.W. 773 (1904), and *State v. Ward*, 170 Iowa 185, 152 N.W. 501 (1915). Thus, the necessity defense has been raised effectively to protect a variety of interests, both within and without this jurisdiction, in connection with so-called strict liability statutes.

The additional subjects require discussion. While the Court has found no precedents precisely analogous to the case at bar, two recent decisions in this jurisdiction have discussed the necessity defense in connection with drug charges. *Gorham v. United States*, 339 A.2d 401 (D.C. App. 1975), and *United States v. Moore*, *supra*. In *Gorham*, the D.C. Court of Appeals was confronted with appeals from convictions of possession of heroin and of implements of crime in violation of D.C. Code

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Washington, West Virginia, Wyoming, New Hampshire and Vermont have enacted legislation similar in purpose to the Controlled Substances Act. Of the seven states still using the Uniform Narcotics Act, five have enacted legislation specifically removing marijuana from the classification of narcotic. In addition, the Supreme Court of Alaska has held in *Ravin v. State*, 537 P.2d 494 (Alaska, 1975), that the federal and state constitutions protect the right of individuals to have marijuana in their homes for their own use.

29. The Court thus does not reach the constitutional issues raised by the defendant in his briefs and argument. However, the Court agrees that a law which apparently requires an individual to submit to deteriorating health without proof of a significant public interest to be protected raises questions of constitutional dimensions. Furthermore, the Court declines to address defendant's motion for an injunction, believing that it is not ripe for decision at present.

30. This proposition appears in Note, *Criminal Liability without Fault: A Philosophical Perspective*, 75 Colum. L. Rev. 1517, 1541 (1975). However, the Court notes that no authority is cited for this position.

31. This chapter later provides that marijuana may be obtained on prescription, but in view of the total prohibition on marijuana possession, sale and use under federal law, the Court takes judicial notice that it is not legally obtainable in the District of Columbia.

32. *Weaver*, *supra* at 4.

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33-402 and 22-3601 respectively. It was alleged that because of the defendants' heroin addiction, they were incapable of harboring the requisite criminal intent and therefore that they should not be held criminally responsible for their actions. Rejecting this defense, the Court held that for reasons of law and public policy, addiction cannot constitute a defense to possession of illegal drugs. Faced with a statute designed to control dangerous drugs, and to provide treatment for addicts who might not otherwise seek it, the Court refused to render a decision which would, in effect, completely nullify the law. The opinion also stresses that drug addiction is not a victimless crime, but rather one whose cost is borne by the taxpayers and the victims of the burglaries, robberies and muggings perpetrated to support drug habits.

In *United States v. Moore*, *supra*, defendant appealed from conviction of possession of heroin in violation of two federal statutes. Without disputing that the government had established each of the elements of the offense, appellant contended that his heroin addiction negated a primary requisite for criminal responsibility, "the capacity to control behavior."[33] Affirming the conviction, the Court noted that since defendant's ingestion of the heroin had been knowing and voluntary, the compulsion brought about by the drug could not be raised as an excuse for its criminal behavior. As Judge Leventhal in his concurring opinion makes clear, to permit such a defense would be to broaden impermissibly the contours of the original common law defense. Under the defendant's formulation, he argues, court would be constrained to except most drug users from criminal penalties, a consequence in clear violation of the intent of Congress to protect the public. For this reason, and because of the attendant problems of developing objective standards of proof, Judge Leventhal believes that the necessity defense should not be available to this defendant.

Both of these decisions are readily distinguishable from the case at bar. Unlike the defendants in *Moore* and *Gorham*, the accused in the instant case did nothing to bring about the circumstances necessitating his use of the prohibited drug. Recognition by the Court of this defense will not have the effect of nullifying the statute. Medical necessity is difficult to demonstrate, and would not be available to a sufficiently large number of those accused that it would support wholesale use of marijuana. Objective standards of proof can be developed without undue hardship, since the existence of a disease and its response to the drug can be demonstrated scientifically. In addition, permitting this limited use of marijuana, a drug with no demonstrably harmful effects, will not endanger the general public in the way that heroin might. Thus *Moore* and *Gorham* are inapposite; the rulings do not dictate a decision in the instant case.

Finally, it is appropriate here to discuss the burden of proof where the necessity defense is raised. While this issue does not arise in the case at bar, the government having contested only the applicability of the defense, the Court anticipates that it will be significant in the future. In general, an accused who raises any of the so-called affirmative defenses bears to some extent the risk of nonpersuasion. The weight of the burden in any given case, however, depends on the law's conception of the nature of the defense. Where the defense is actually an attempt to negate an element of the crime, for example, it must be proven beyond a reasonable doubt that the facts alleged by the defendant are not to be believed. Where defendant interposes a justification defense such as duress, necessity, or self-defense, on the other hand, a less stringent requirement, such as the preponderance standard, is employed. This point is well illustrated by the varying uses of the insanity defense. Where sanity is seen as an implied element of the crime, the government usually bears the burden of negating defendant's allegation of insanity beyond a reasonable doubt. Where insanity is considered a justification or an excuse for allowing the accused to escape criminal sanctions, however, it is the defendant who must establish it.

Despite this traditional approach, recent cases suggest that the government bears the burden of negating any defense raised by an accused. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court considered an attack on the constitutionality of a Maine statute which required an accused who wished to reduce a charge of murder to manslaughter to prove by a preponderance of the evidence that he had acted in the heat of passion. In an opinion which stressed the importance of the presumption of innocence and the resultant placing on the government of the risk of nonpersuasion, the statute was found to be violative of due process. See also *In re Winship*, 397 U.S. 358 (1969), where the Supreme Court, in extending to juvenile cases the obligation of the government to establish guilt beyond a reasonable doubt, discussed the influence of the presumption of innocence in placing the burden of persuasion on the prosecution.

A case in a neighboring jurisdiction, *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975), has interpreted *Mullaney* as requiring the government to bear the burden of disproving all defenses. The District of Columbia Court of Appeals, however, has rejected this view. In *James v. United States*, 350 A.2d 748 (D.C. App. 1976), defendant appealed from a conviction of possession of implements of crime, alleging constitutional infirmities in the statute. Arguing that the provision allowing an accused to show innocent possession impermissibly shifted the burden of proof, the defendant contended that the statute was unconstitutional in light of the *Mullaney* decision. Affirming defendant's conviction, the Court distinguished *Mullaney* on several grounds, most notably because the *Mullaney* decision was based on a finding that there was no valid justification for placing on the defendant the burden of establishing a "fact so critical to criminal culpability".[34] In *James*, however,

> only the accused could know of possible innocent reasons he may have possessed the implements of a crime, and it does not violate due process to require him to give a satisfactory explanation for otherwise validly presumed criminal possession.[35]

This Court believes that *James*, which is controlling in this jurisdiction, takes the correct approach for cases of necessity. Since the defense does not attempt to disprove any element of the government's case, it should be classified as an affirmative defense which the accused bears the burden of establishing. In addition, the necessity defense, like the innocent possession raised in *James*, is one uniquely within the knowledge of the defendant. Placing the burden of persuasion on the defendant does not conflict with the presumption of innocence, since necessity of its nature arises only in cases where the defendant admits committing the prohibited act. Thus, a defendant who seeks to avail himself of the necessity defense should be required to prove it by a preponderance of the evidence. The defendant in the instant case has carried this evidentiary burden.

CONCLUSION

Upon the basis of the foregoing discussion, the Court finds that defendant Robert C. Randall has established the defense of necessity. Accordingly, it is the finding of this Court that he is not guilty of a violation of D.C. Code §33-402, and that the charge against him must be and hereby is

DISMISSED.

34. 421 U.S. at 702.
35. 350 A.2d at 749.

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LEGAL NOTICES

U.S. COAST GUARD

Notice is hereby given that an order dated December 15, 1976, has been issued by the undersigned authorizing the name of the Gas Screw Vessel, BOBBIE B, official number 539436, owned by Hollywood House T.V., of which Washington, D.C. is the home port, to be changed to ANDY

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Editor's Note: On occasion, readers have submitted for publication orders and opinions of circuit courts which were deemed to be of great importance and widespread interest. Because the Florida Law Weekly format included no appropriate place for the publication of these opinions, and because we felt the number of such opinions submitted for publication did not justify the creation of a new "Circuit Courts" section, these opinions were included in the DCA section. In recent weeks, the frequency of our receipt of circuit court opinions for publication has increased, and the continued inclusion of these opinions in the DCA section is no longer justified.

With this issue, therefore, we are beginning a "Circuit Courts" section with the publication of one opinion which has not heretofore been published in The Florida Law Weekly and the republication of two opinions which were initially published in volume 14, issue no. 2, at DCA 104 and DCA 105. Page number citations to this section in the index and tables will include the prefix "CIR." When quarterly cumulative indexes are published and pages are transferred from the ring binder to the post binder, pages from this section should be filed behind the last tab page along with pages from the Attorney General's Opinions section.

Please note that we are not actively soliciting material directly from the circuit courts. The only orders and opinions published will be those that our readers consider to be of sufficient importance to submit for publication. We hope that you will find this addition to be a beneficial one.

Criminal law—Cultivation of marijuana—Common law defense of medical necessity is available to defendant who cultivated and used marijuana to treat glaucoma—Defense of medical necessity is valid defense where it is shown that a genuine medical disorder exists, that the defendant did not bring about the circumstances causing defendant to break the law, that the decision to do the illegal act was tailored to minimize the effects of the medical disorder, and that the benefits derived from the use of the illegal substance are greater than the harm sought to be prevented by the controlled substances law

STATE OF FLORIDA, vs. ELVY MUSSIKA, Defendant. 17th Judicial Circuit in and for Broward County. Case No. 88 4395 CFA 10. December 28, 1988. Mark E. Polen, Judge. Norman Elliott Kent, P.A., for Defendant. Carol Wilhelm, ASA, State Attorney's Office.

O-P-I-N-I-O-N

On March 5, 1988, the defendant, Elvy Mussika, was arrested and charged with cultivation of marijuana, in violation of Florida Statute § 893.13 (1) (a). The case came before the Court for trial on August 15, 1988. The Court heard testimony from three witnesses, including the defendant. After due deliberation, the Court found Ms. Mussika not guilty of the charges by reason of a defense of medical necessity. The Court now renders the following decision.

Facts

The central facts of this case are not in dispute. On March 5, 1988, and in response to a call from the defendant concerning a disturbance by a tenant, Officers O'Hara and Ferguson seized four plants from the defendant's home and charged the defendant with the criminal cultivation of cannabis sativa L, more commonly known as marijuana.

There is no question in this case that the defendant, Ms. Elvy Mussika, was growing marijuana in her home. The defense has stipulated that the plants confiscated from Ms. Mussika's home by Officers O'Hara and Ferguson are, in fact, marijuana plants. The defense has also stipulated that the seized plants are of a sufficient weight to make said cultivation of a felony offense under Florida law. If convicted on these charges, the defendant, who has no prior record of criminal conduct, could be sentenced to serve five years in prison and fined $5,000.

There is no dispute in this case that the defendant, Ms. Mussika, is afflicted with glaucoma, a progressive ocular disorder which, inadequately treated, results in blindness.

There is no dispute over the facts of Ms. Mussika's extensive medical history. The defendant has been afflicted with ocular disorders since early childhood. Over the past forty years, she has employed all of the available medical therapies and, when these failed, undergone more than twenty risky surgical procedures in an effort to prolong her failing sight. Based on the testimony presented to this Court, the defendant has, on several occasions participated in research programs where she was exposed to experimental medications and/or has undergone experimental surgical procedures in an effort to preserve her sight.[1] Not only did these experimental procedures fail to reduce the elevated intraocular tensions caused by defendant's glaucoma, but they exposed Ms. Mussika to significant medical risks. Indeed, the last of these surgical procedures cost the defendant her sight in one eye.

At trial, the defendant sought to exonerate herself through the presentation of evidence tending to show that the possession, cultivation and use of marijuana was not undertaken with criminal intent, but as a consequence of her medical necessity to control the blinding ocular tensions caused by her glaucoma.

The Court heard testimony regarding the defendant's medical history from Paul Palmberg, M.D. of the Bascom Palmer Eye Institute. Dr. Palmberg testified that he has treated Ms. Mussika for glaucoma, that her disease is beyond the reach of conventional medical therapies, and that numerous attempts to control her disease through surgical procedures have failed.

Dr. Palmberg further testified that he was aware that the defendant was using marijuana to reduce her blinding ocular tensions.

Based on his testimony, it is clear that Dr. Palmberg did not initially accept the defendant's use of marijuana as a legitimate treatment for glaucoma. However, over time, it became increasingly obvious to Dr. Palmberg that marijuana was, in fact, significantly reducing the defendant's otherwise uncontrollable ocular tensions, and that Ms. Mussika's use of marijuana was not resulting in any apparent adverse effects.

The fact that Dr. Palmberg—clearly no advocate for marijuana's legalization—grudgingly concluded after several years of treatment, that marijuana has a legitimate role to play in the treatment of Ms. Mussika's otherwise uncontrollable glaucoma, was very persuasive to this Court. Not only is Dr. Palmberg a highly respected medical practitioner and ocular specialist from one of the leading eye institutes in the United States, but he who has lectured all over the world, reached this conclusion based upon his direct observation and treatment of the defendant over a period of years.

As Dr. Palmberg testified, he first opposed Ms. Mussika's use of marijuana to reduce her eye pressures. However, in the course of treating Ms. Mussika he often checked her intraocular pressures. During these examinations he discovered that on days

when Ms. Mussika reported she had smoked marijuana her intraocular pressures were consistently lower than on days when she reported she had not smoked marijuana. It was only on the basis of the consistent results of these objective medical tests, conducted over a period of years, that Dr. Palmberg came to the conclusion that marijuana is of genuine therapeutic value to the defendant and accepted her use of the drug.

It is clear from the testimony that Dr. Palmberg resisted Ms. Mussika's initial reports of marijuana's therapeutic value and only after considerable time and experience in treating her decided marijuana was, in fact, contributing to her treatment. In this respect, the Court found Dr. Palmberg to be a particularly credible witness who only overcame his initial medical and legal objections after the fact of marijuana's therapeutic benefit to Ms. Mussika could no longer be denied.

Testimony was also taken from a second expert witness, Robert Randall. Mr. Randall, whose expertise was not challenged, has an extensive knowledge of marijuana's therapeutic use and legal control combined with a unique, personal experience with marijuana's medical use. I found him to be a highly credible witness.

Several aspects of Mr. Randall's experience are strikingly similar to the instant case.

First, Mr. Randall, a glaucoma patient, has legally employed marijuana, under medical supervision, for more than ten years. Through the legal, medical use of marijuana, he has managed to prolong his sight. The fact that Mr. Randall has legally employed marijuana for the specific purpose of controlling the elevated ocular tensions associated with glaucoma was especially pertinent to the particular facts in this case. As outlined by Dr. Palmberg, the defendant, Ms. Mussika, like Mr. Randall, suffers from glaucoma which cannot be controlled through the use of available medical treatments. And, like Mr. Randall, the defendant in this case discovered that the use of marijuana could significantly reduce the elevated ocular tensions caused by glaucoma. That testimony, too, is undisputed.

The only apparent difference between Mr. Randall's medical condition and the condition of the defendant in this case is that Ms. Mussika, unlike Mr. Randall, has also undergone many surgical procedures in an unsuccessful effort to preserve her vision. Mr. Randall testified that through the licit, therapeutic use of marijuana he has been able to prolong his sight short of surgical intervention.

A second aspect of Mr. Randall's testimony was also of particular interest to this Court. Like the defendant, Elvy Mussika, Mr. Randall, when he first discovered marijuana's therapeutic benefits, attempted to grow marijuana to meet his medical needs and, as a consequence of his cultivation of marijuana, was arrested in 1975 in the District of Columbia and charged with a violation of the criminal law, namely, possession of a controlled substance.

At trial, Mr. Randall successfully asserted the defense of medical necessity. Expert medical witnesses with direct knowledge of Mr. Randall's medical condition testified that, absent marijuana's medical availability, Mr. Randall's disease could not be controlled through conventional medical means and he would go blind or be forced into risky surgical procedures.[2]

Two additional points emerged from Mr. Randall's testimony. First, despite his chronic, long-term and heavy use of marijuana (averaging 10 marijuana cigarettes per day), Mr. Randall's testimony was well spoken and extremely cogent. He testified that neither he nor his physician could detect any significant, long-term, adverse effects caused by his chronic use of marijuana.

Both Mr. Randall and Dr. Palmberg, in their respective testimony, however, noted many conventional glaucoma control drugs can, in fact, produce very serious, even life-threatening adverse effects. Both the defendant and Mr. Randall stated they had experienced significant adverse effects from standard glaucoma control agents.

Second, and not insignificantly, Mr. Randall is not blind. Given the nature of his medical history, as outlined in *United States v. Randall*, and as related to his testimony, it is very clear that Mr. Randall's legal access to medicinal marijuana—as provided to him by federal agencies—has played a critical role in helping to prolong his sight.[3] The fact that federal agencies provide marijuana to Mr. Randall to meet his legitimate medical needs, yet deny similarly afflicted individuals, like defendant, Elvy Mussika, similar licit access to care strikes this Court as irrational and discriminatory.

The third witness in this case was the defendant, Ms. Elvy Mussika. Ms. Mussika displayed great candor and honesty throughout these proceedings. From the day the police came to her house and asked to see her plants, she has not hesitated to tell the truth. She did not deny she was growing marijuana or attempt to mislead the police officers in any way. Indeed, she led them to her plants. At no time did she deny the plants were marijuana or seek to evade the officer's questions. She did not, in fact, act like a person with a guilty conscience. In every respect, this defendant has told the truth, even to her possible detriment.

The defendant was equally candid in explaining to the arresting officers why she was growing the marijuana, saying, "By all means, yes, I have marijuana. I take it for my eyesight. Here it is officer." The fact Ms. Mussika had, previous to her arrest, fully discussed her medical use of marijuana with Dr. Palmberg and other physicians, underscores the defendant's circumstance, as she viewed them, at the time of her arrest. I found Ms. Mussika to be one of the more credible witnesses I have ever heard.

The only other witness in the case was Officer Ferguson, the arresting officer. The officer's conduct was meritorious. He saw marijuana, knew its possession was against the law, and dutifully effectuated an arrest. The defendant does not dispute the validity of the arrest. Officer Ferguson's testimony was concise and concrete, verifying the candor of Ms. Mussika.

Opinion

This is a case of first impression in this jurisdiction, one which raises significant legal issues. Consequently, the Court recognizes its responsibility to set forth clearly the applicable law. The questions presented by this case are, is there a common law defense of medical necessity to criminal charges? If so, have the elements of the defense been established in this case?

While this is a case of first impression in this jurisdiction, it is not a case of first impression in the United States. As mentioned above, in *United States v. Randall, supra*, the Court recognized the defense of medical necessity in a case involving the use of marijuana to treat glaucoma. In the case of *State v. Diana*, 604 P.2d 1312 (Wa. 1981), the Court recognized the defense in a case involving the use of marijuana to treat multiple sclerosis.

In fact, a general defense of necessity has been recognized by legal scholars since the beginning of the twentieth century and is deeply rooted in on religious, cultural and legal traditions. *See*, C. Kenny, "Outlines of Criminal Law" 68-70 (1970); W. Clark and W. Marshall, "Treatise on the Law of Crimes", 104 et. seq. (4th Ed. 1940); W. Burdick, "The Law of Crime" 260 (1946); M. Bassouini, "Criminal Law and its Processes" 108 et. seq. (1969). *Medical Necessity as a Defense to Criminal Liability*, 46 G. Washington L. Rev. 272 (1978); *The Right to Choose a Lesser*

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Evil, 65 J. Crim. L. 289 (1974). It has also been recognized by the Model Penal Code, §§3.01 and 3.02 and Comment (Tent. Draft No. 8, 9, 10, 1958). There is substantial unanimity that the defense of necessity exists.

Clark and Marshall, *supra*, note:

> An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil.

Necessity as was noted in *United States v. Randall*, is "the conscious, rational act of one who is not guided by his own free will. It arises from a determination by the individual that any reasonable man in his situation would find, the personal consequences of violating the law less severe than the consequences of compliance", at 104 Wash. Daily Rptr. 2249 (1976).

In *Diana*, the Court described the defense as one that is available "when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from the violation of law. *State v. Diana, supra*, at 1314.

The defense of medical necessity can be fairly compared to the law of self-defense. An action which constitutes a crime, e.g. an assault, battery or homicide, can be justified by the need to protect oneself or another person from harm. When a person undertakes an otherwise criminal action in order to prevent such harm, the person may be found not guilty of that crime. In essence, the person is compelled by circumstances beyond his control to breach the law in order to prevent injury.

With medical necessity, the individual is threatened with injury by a law that does not allow the use of a medicine. The individual is forced by circumstances beyond her control to take what would otherwise be an illegal act. Medical necessity is a form of self-defense against a generalized legal restraint, which blindly adhered to would cause irreversible biological injury that was not intended by the legislature.

The contours of the law of medical necessity were best described by the Court in *United States v. Randall, supra*. In that case, the Court examined three issues:

> 1. Whether the cause or circumstance was brought about by the actor himself;
>
> 2. Whether the same objective could have been accomplished by a less offensive alternative which was available to the actor;
>
> 3. Whether the evil sought to be averted was less heinous than that performed to avoid it.

Id. at 2252.

Counsel for Ms. Mussika, a respected and knowledgeable criminal defense attorney, Norman Elliott Kent, Esq., propounded the following standards for the case *sub judice:*

> The defense of medical necessity is a valid defense to the crime charged, and the defendant may be found not guilty by reason of medical necessity, if you, the trier of fact, determine that the defendant, Elvy Mussika, shows, by a preponderance of the evidence that:
>
> (a) a genuine medical disorder does, in fact, exist;
>
> (b) that the defendant did not bring about the circumstances causing her to break the law, that is, that Ms. Mussika is not responsible for causing her medical disorder, glaucoma;
>
> (c) that weighed under the totality of the circumstances, Ms. Mussika's decision to do the illegal act, that is, to grow and use marijuana, was genuine and reasonable, tailored to minimize the effects of the medical disorder; and,
>
> (d) that the benefits derived from the use of the illegal substance are greater than the harm sought to be prevented by the controlled substances law; that is, whether Ms. Mussika's alleged "right to sight" outweighs the social harm that her use of marijuana might cause.

The Court hereby adopts these standards, and notes there was no objection from the State in accepting said application. In applying these standards to the case before the Court, there can be no question that the defense of medical necessity applies to the case at bar.

With regard to the first issue raised, there is no dispute that Ms. Mussika has glaucoma and that she did not bring about the condition. She has had glaucoma all her life and she did not cause that unfortunate condition. Indeed, the Court notes that even the defendant's children, both State university students, have been afflicted with the disease.

With regard to the second issue, Ms. Mussika has exhausted all of the available glaucoma control drugs and surgical procedures including experimental, alternative treatments. They have simply not worked. In fact, the last experimental surgery that was tried on Ms. Mussika was a disaster, resulting in the loss of her sight in one eye. Thus, not only have the available treatments failed, they have presented grave risks. The preponderance of the evidence in this case clearly indicates that this patients' glaucoma is beyond the reach of available medical therapies.

This Court further notes that the Chief Administrator Law Judge of the DEA, Francis L. Young, recently recommended that marijuana be rescheduled to Schedule II of the Federal Controlled Substances Act to allow its medical uses. In making that determination, he noted the dangers of drugs used in treating glaucoma:

> The adverse physical consequences resulting from the chronic use of commonly employed glaucoma control drugs include a vast range of unintended complications from mild problems like drug induced fevers, skin rashes, headaches, anorexia, asthma, pulmonary difficulties, hypertension, hypotension and muscle cramps to truly serious, even life-threatening complications including the formation of cataracts, stomach and intestinal ulcers, acute respiratory distress, increases and decreases in heart rate and pulse, disruption of heart function, chronic and acute renal disease, and bone marrow depletion.
>
> Finally, each FDA-approved drug family used in glaucoma therapy is capable of producing a lethal response, even when properly prescribed and used. Epinephrine can lead to elevated blood pressure which may result in stroke or heart attack. Miotic drugs suppress respiration and can cause respiratory paralysis. Diuretic drugs so alter basic body chemistry, they cause renal stones and may destroy the patient's kidneys or result in death due to heart failure. Timolol and related beta-blocking agents, the most recently approved family of glaucoma control drugs, can trigger severe asthma attacks or cause death due to sudden cardia arrhythmias often producing cardiac arrest.

In the Matter of Marijuana Rescheduling Petition, Dkt. No. 86-22, page 62 (U.S. Department of Justice, Drug Enforcement Administration, September 6, 1988).

It is appropriate for this Court to compare marijuana to the available glaucoma control therapies described above. The testimony in this case indicates that Ms. Mussika has legally and justifiably used marijuana for over a decade.

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Thus, it is evident that marijuana is a medically less offensive alternative in Ms. Mussika's case. Not only have other glaucoma treatments failed, they are also more dangerous than marijuana.

Finally, the harm avoided in this case is clearly more serious than that performed to escape it. The harm Ms. Mussika is seeking to avoid is irreversible blindness. The undisputed testimony in this case demonstrates that without marijuana Ms. Mussika will lose one of her senses and become blind. With marijuana, she has a chance to save or prolong her eyesight. And even with marijuana, she may still lose her eyesight. But this Court will not deny to her the one vehicle that may, with God's help, preserve her vision. It seems self-evident that any rational person under these circumstances would violate the law to save their sight. The law was not intended to punish people who make this type of a reasonable decision to save their senses.

The harm performed, is the violation of the marijuana laws. In Ms. Mussika's case, she was growing marijuana for her personal use. In this regard, she was avoiding the black market in marijuana. Any harm from her marijuana possession and cultivation would be to herself. She avoided any harm to others by avoiding the black market. Even the harm to herself, on balance, is less weighty than the risk of blindness. As was noted in *United States v. Randall, supra.* "[I]t is doubtful [marijuana's] slight, speculatative and undemonstratable harms could be considered more important than defendant's right to sight".

Indeed, the marijuana laws are the most disputed of the nation's drug laws. The actions of Ms. Mussika, cultivation of marijuana for personal use, have actually been legal in Alaska since 1975. In addition, thirty-four states have passed laws allowing the use of marijuana or its psychoactive ingredient, THC, as a medicine. Thus, while her actions were violations of the law, they are clearly not as damaging as her loss of sight.

One point I want to emphasize is that no one should interpret this decision as the Court giving a green light to the consumption of marijuana. That is not the message of this opinion. Marijuana use continues to be against the law. Ms. Mussika's circumstances, while not unique, are somewhat unusual. The message of this decision is that the law is flexible enough, and humane enough, to allow an individual to preserve her eyesight with a substance that is generally illegal. Indeed, this Court hopes that this decision, and the other decisions cited herein, will encourage legislators and regulators to correct the anomaly in the law which forces people trying to save their lives and senses into becoming criminals.

The government is charged with a responsiblity to see that its laws are faithfully obeyed. And the Court does not dispute the government's legitimate role in regulating drugs. But the absolute prohibition against marijuana's use, even when such use may be therapeutically required to avoid grave and irreversible injury, appears on its face to be irrational. Such a sweeping, indiscriminate prohibition is not well founded.

Surely the Florida legislature, when it embraced such a total prohibition, could not have foreseen the possibility that a socially abused substance like marijuana might prove to be of critical medical value to patients confronting life-threatening and sense-threatening diseases.

In our haste to rightfully prosecute those who profit from the social trafficking and sale of illicit drugs we cannot become blind to the legitimate medical needs of those who are afflicted by incurable diseases and require appropriate medical care. To ignore the plight of such people renders the law callous to the most basic of all human rights; the right of self-preservation.

Finally, the Court is deeply disturbed by the broader implications of the testimony presented in this case. Medical necessity is a stringent, demanding legal defense. The practice of medicine, however, cannot be predicated upon the legal requirements of the medical necessity defense if it is to preserve health in a rational, compassionate manner. As this decision, and the earlier decisions cited herein illustrate, marijuana has "an accepted medical use in treatment". Indeed, the evidence indicates marijuana is now being employed, albeit illegally, by patients throughout the United States. In the vast majority of such cases, these desperately ill people are being forced underground and away from urgently needed medical supervision to acquire marijuana.

This is an intolerable, untenable legal situation. Unless legislators and regulators heed these urgent human needs and rapidly move to correct the anomaly arising from the absolute prohibition of marijuana which forces law-abiding citizens into the streets—and criminality—to meet their legitimate medical needs, cases of this type will become increasingly common in coming years. There is a pressing need for a more compassionate, humane law which clearly discriminates between the criminal conduct of those who socially abuse chemicals and the legitimate medical needs of seriously ill patients whose welfare and very lives may depend on the prudent therapeutic use of those very same chemical substances.

Conclusion

Upon the basis of the foregoing discussion, the Court finds that the defendant, Elvy Mussika, has established the defense of medical necessity. Accordingly, it is the decision of this Court that she is not guilty of violation of Florida Statute § 893.13 (1) (a), and the defendant is hereby discharged.

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[1]These "experimental" procedures included the use of medical and/or surgical therapies which are not yet approved by the FDA for general medical use.

[2]*United States v. Randall,* 104 Wash. Daily Rptr. 2249 (1976).

[3]Based on testimony from Ms. Mussika, Dr. Palmberg and Mr. Randall it is clear the defendant, Ms. Mussika, has made numerous attempts to acquire licit access to marijuana to meet her legitimate medical needs. She asked a number of physicians to assist her in acquiring prescriptive access to marijuana, but they refused to assist her because of the tremendous paperwork and technical knowledge involved in such an undertaking.

Desperate to prolong her sight, the defendant, at one point in 1987 telephoned the Hollywood Police Department to request their help in securing licit access to marijuana.

Only after the defendant was arrested on March 5, 1988, did she learn from Mr. Randall that her physician could request legal access to marijuana from the Federal Food and Drug Administration. At this juncture Dr. Palmberg and Mr. Randall agreed to assist her in filing for a "Compassionate" Investigational New Drug "IND" from the FDA.

Despite the fact Dr. Palmberg filed his request with the FDA in April, 1988, FDA had not as yet approved Dr. Palmberg's request for licit supplies of marijuana to treat Ms. Mussika. At the time of this writing—and despite the verdict of this Court—Ms. Mussika has yet to receive any legal marijuana from FDA to meet her legitimate medical needs. The Court is greatly disturbed by the fact that, because of federal inaction, Ms. Mussika must use illicit marijuana if she is to save her sight. Such a situation is not legally tenable, much less moral.

* * *

(H)

Torts—Medical malpractice—Attorney's fees—Where cause of action arose while statute providing for recovery of attorney's fees was in effect, but suit was commenced after repeal of that statute, prevailing party is entitled to award of attorney's fees—Entitlement of prevailing party to recover attorney's fees is substantive right which accrues at time of underlying alleged malpractice

MARVIN P. FOWLER and LINDA BEATRICE FOWLER, his wife,

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PROVINCIAL COURT (CRIMINAL DIVISION)

HER MAJESTY THE QUEEN

against

TERRANCE PARKER

****

REASONS FOR JUDGMENT

BEFORE HIS HONOUR JUDGE K. A. LANGDON,
on December 15, 1987, at Brampton, Ontario.

CHARGE: 3(1) N.C.A.

APPEARANCES:

Counsel for the Federal Crown	I. B. Cowan, Esq.
Counsel for Terrance Parker	W. B. Fedunchak, Esq.

****

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MR. COWAN: Good morning, Your Honour. Thank you for the courtesy in allowing me to call the Parker case now, sir, if you're up-to-date.

THE COURT: Yes.

MR. FEDUNCHAK: Good morning, Your Honour. If it please the Court, my name is Feduncha*k.

THE COURT: I apologize for the problem on the last occasion; I think I was re-scheduled somewhere else.

MR. FEDUNCHAK: I can appreciate that.

R E A S O N F O R J U D G M E N T

LANGDON,K.A. P.C.J.

I have reviewed the evidence and the defence of necessity as the Supreme Court of Canada defined it in the case of PERKA. Having reviewed all of the evidence, it is my view that the evidence fairly raises the "defence". I am not satisfied beyond a reasonable doubt that the prosecution has negated each and every element.

For that reason I will enter a verdict of not guilty.

****

MR. FEDUNCHAK: Thank you very much, Your Honour.

****

CERTIFIED A TRUE AND ACCURATE
COPY OF MY RECORDING TO THE
BEST OF MY SKILL AND ABILITY.

Sandra Wells
Court Monitor

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SW 4/28/88

IN THE DISTRICT COURT OF ONTARIO
IN THE JUDICIAL DISTRICT OF PEEL

B E T W E E N -

HER MAJESTY THE QUEEN

APPELLANT

and

TERRANCE PARKER

RESPONDENT

NOTICE OF APPEAL

TAKE NOTICE that the Attorney General of Canada appeals the order dismissing the information against the Respondent on the 15th day of December, 1987, by Provincial Court Judge Langdon, at Provincial Court (Criminal Division), at the City of Brampton, in the Judicial District of Peel, Province of Ontario.

A. PARTICULARS OF ORDER APPEALED FROM:

1.	Statute and Section thereof under which information laid:	Section 3(1) of the Narcotic Control Act
2.	Date and place of offence:	July 11, 1986 in the Judicial District of Peel
3.	Plea at trial:	Not guilty

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B. GROUNDS OF APPEAL:

1) That the trial Judge erred in law in acquitting the Respondent in light of the evidence that he was in possession of marihuana;

2) that the trial Judge also erred in law in acquitting the Respondent by giving effect upon the evidence to a defence of necessity;

3) such further and other grounds as Counsel may advise and this Honourable Court may permit.

C. RELIEF SOUGHT:

The relief sought is that the appeal be allowed, the verdict of acquittal set aside and a verdict of guilty be entered and a sentence warranted in law be passed, or in the alternative, a new trial be ordered.

The address for service on the Attorney General of Canada is:

The Director
Department of Justice
Toronto Regional Office
1 Front Street West
Suite 500
TORONTO, Ontario
M5J 1A5

DATED at the City of Toronto, Province of Ontario, this 6th day of JANUARY, 1988.

Michael R. Dambrot
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TEL.: (416) 973-3055

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THE DISTRICT COURT OF ONTARIO
THE HONOURABLE JUDGE
B. BARRY SHAPIRO

NOVEMBER 17th, 1988

B E T W E E N:

HER MAJESTY THE QUEEN
Appellant

and

TERRANCE PARKER
Respondent

O R D E R :

UPON the Attorney General of Canada, appealing the order, dismissing the information against the Respondent on the 15th day of December, 1987, by Provincial Court, Judge Langdon, at Provincial Court, (Criminal Division), at the City of Brampton, in the Judicial District of Peel, Province of Ontario, on a charge of Section 3(1) of the Narcotic Control Act of Canada.

This Appeal being heard at District Court, Brampton, November 8th, 1988 before The Honourable Judge B.Barry Shapiro, and upon written reasons received November 17th, 1988,

1. THIS COURT ORDERS that the appeal will be dismissed.

DATED AT DISTRICT COURT, BRAMPTON
November 17th, 1988

DEPUTY LOCAL REGISTRAR
District Court, Brampton

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SET IN CRT APR 15/88
Pursuant To Rule 6 (2) (a) Of the Summary
Conviction [illegible] that
[illegible]
[illegible] Law
[illegible]
[illegible] Respondent
[illegible] Law
[illegible] days [illegible] the
[illegible]

judge

Ent. tem 2 Ln
November 1988
Appearances -
for the Crown Appellant:
David M Stone Esq.
For the Respondent Parker:
Ms. Diane L. Marvin
Appeal heard. Judgment
reserved.
7 November 1988
I have reviewed the
evidence in this matter
and considered the law
as set out in Pierka v The Queen
(1984) 14 CCC (3d) 385.
In light of the long history
(27 years) of grand mal epilepsy
of the respondent, age 31, and
the continuing attempts at
treatment including two
surgical procedures, there
was evidence upon which
the learned trial judge
could have found, that
the accused respondent

IN THE DISTRICT COURT OF ONTARIO
IN THE JUDICIAL DISTRICT OF PEEL

B E T W E E N -

HER MAJESTY THE QUEEN

APPELLANT

and

TERRANCE PARKER

RESPONDENT

NOTICE OF APPEAL

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benefit of reasonable doubt ie his defence of necessity. Particularly is this so in the light of the comments of Dickson J. (as he then was) at pages 398 and 399 of Perka, with reference to "moral (MORAL) (INSANE) and normative involuntariness (INVOLUNTARINESS)"

The appeal will therefore be dismissed.

B. Barry Shapiro
Judge

I should add that it may be appropriate for the respondent to pursue further the matters referred to in the letters filed as Ex #1 at trial.

BBS

C3-90-1628

STATE OF MINNESOTA

IN COURT OF APPEALS

STATE OF MINNESOTA,

Respondent,

vs.

GORDON LEROY HANSON,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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STATE OF MINNESOTA

IN COURT OF APPEALS

STATE OF MINNESOTA,

Respondent,

vs.

GORDON LEROY HANSON,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

LEGAL ISSUES

1. Whether the existence of the defense of medical necessity is an issue before this court.

The trial court did not rule on this issue.

2. Whether the trial court properly precluded the defense of medical necessity under the facts of this case.

The trial court ruled in the affirmative.

3. Whether the expansion of the medical necessity defense should occur by legislative rather than judicial action.

The trial court ruled in the affirmative.

4. Whether Minnesota statutes prohibiting marijuana use and possession violate appellant's constitutional rights to privacy, due process or equal protection.

The trial court was not asked to rule.

PROCEDURAL HISTORY

Respondent accepts appellant's statement of the procedural history with the following corrections and additions:

1. November 3, 1989: Omnibus hearing held before the Honorable Dennis J. Murphy. Appellant requests that his motions to dismiss on the grounds that Minn. Stat. § 152.09, subdivisions 1(1) and 1(2) are unconstitutional be held in abeyance.

2. December 29, 1988: The Honorable Dennis J. Murphy issues findings of fact and an order denying appellant's motions and noting that the motions asserting the unconstitutionality of Minn. Stat. § 152.09, subdivisions 1(1) and 1(2) were not heard.

3. April 6, 1990: Appellant requests the court to certify the question of whether a medical necessity defense exists in Minnesota.

4. April 10, 1990: Court denies appellant's request to certify question.

5. April 12, 1990: Appellant seeks discretionary review of order granting the State's motion to exclude the medical necessity defense.

6. May 1, 1990: The Court of Appeals, the Honorable Judges Parker (presiding), Crippen and Gardebring, deny appellant's petition for discretionary review.

7. July 18, 1990: Appellant files notice of appeal.

8. September 20, 1990: Respondent receives appellant's brief in the mail.

STATEMENT OF THE CASE AND FACTS

It is necessary in this case for respondent to present a more complete statement of the case and facts than usual, inasmuch as appellant has failed to state the facts in his brief with complete candor, as required by Minn. R. Civ. App. P. 128.02, subd. 1(1). Further, appellant has failed to acknowledge two pretrial orders and a decision of the Minnesota Court of Appeals which directly bear on the issues raised by appellant.

This is not the first time the appellant has been before the appellate courts of Minnesota challenging the constitutionality of his conviction for the illegal possession of marijuana. In State v. Hanson, 364 N.W.2d 786 (Minn. 1985) the Minnesota Supreme Court found against appellant and held that the legislature properly refused to recognize marijuana's medical value and to reclassify the drug.

This time, appellant Gordon Leroy Hanson was charged and convicted in Roseau County District Court with two alternative felony counts of possessing and manufacturing marijuana, in violation of Minn. Stat. §§ 152.01, subd. 7, 9; 152.02, subd. 2(3); 152.09, subd. 1(1), (2); and 152.15, subd. 1(3)(ii), 2(2). The Honorable Dennis J. Murphy, Judge of District Court, presided.

The charges arose out of evidence obtained pursuant to a search warrant and the arrest of appellant on July 27, 1990.

Testimony from several law enforcement officers was presented at the Omnibus Hearing held on November 13, 1989. Patrick Novacek, Sheriff of Roseau County, had been personally acquainted with the appellant since the early 1980's (T.O.H. 15)1/ and, as long as Sheriff Novacek could recall, appellant had used and grown marijuana (Id. at 16).

Prior to obtaining the search warrant, officers had driven by appellant's residence several times in July of 1989, and observed what appeared to be marijuana growing on the west end of the property. Aerial observations were made by Sheriff Novacek and others on July 26, 1989 (Id. at 16, 19, 86-87). On the same date, Sheriff Novacek applied for a search warrant from Judge Shanahan (T.O.H. 19) and the warrant was executed at appellant's residence during the early morning hours of July 27, 1989. In addition to Sheriff Novacek, four other officers participated in the search (Id. at 20). Upon approaching the house, officers saw people moving within the house and at least one person, if not two, were looking out (Id. at 20, 75). Officers forced their way into the house due to the exigency and a locked door (Id. at 20, 21).

Officers secured the house and determined that the appellant, his wife and his son were the only ones present (T.O.H.

1/ T.O.H. refers to the transcript of the omnibus hearing of November 13, 1989.

at 21). Sheriff Novacek testified that prior to starting the search of the premises, he read appellant his Miranda rights by use of a card in the possession of Officer Jule Hanson (T.O.H. 21).

After appellant expressed some concern about how the search would be executed, appellant stated that there was only a "small amount" in the house and that it was located in the kitchen (Id. at 22).

The search not only included the house but the surrounding area and outbuildings. Officers found approximately 120 marijuana plants growing in the garden and marijuana drying in a red, barn-like structure which was located west and a little bit south of the house (Id. at 22, 23). The distance between the public road and the garden area where the marijuana was seized was approximately 30 feet (Id. at 34), and there were no enclosures or fences surrounding appellant's house (Id. at 37).

Small amounts of marijuana were found in numerous places throughout the house and a triple beam scale was found underneath the bed in the bedroom located in the upstairs on the north side. Gardening tools were found in the back part of the barn as well as strings hanging from the ceiling for drying marijuana, plastic bags to put over the roots, and a table for manicuring or clipping and bagging portions of the marijuana (Id. at 77, 78).

Officers found rocks by certain plants and appellant explained that the rocks were used to decide which plants were going to be dried next and for other classifications of the plants

(T.O.H. 26). There were no weeds around the well maintained plants (Id. at 78). The marijuana seized from appellant's property was dried and weighed and determined to be approximately five pounds (Id. at 80-82). Less than an ounce and a half of marijuana was found inside the residence (Id. at 48, 49).

During the search, appellant admitted that it was all his marijuana.

After execution of the search warrant, appellant was taken into custody and transported to the law enforcement center. Appellant was again read his Miranda rights and agreed to speak to the officers (Id. at 24, 25). Appellant admitted that the marijuana was his, and that he was growing it in the garden. Appellant further talked about growing it for his own use, saying, "You know, Officer Novacek, that I grow it for my medical reasons" (Id. at 25). Novacek testified that there was also some discussion about drinking and that appellant explained that he did not drink alcohol but did occasionally use marijuana just for enjoyment (Id. at 25, 59). According to Novacek, appellant further stated that he worked the plants most every evening in the garden (Id. at 25, 26), that he knew that marijuana was against the law but that there were different interpretations of that law (Id. at 26), that he was planting more this year because he had ran out the previous year, and that he had grown the marijuana almost every year (Id. at 27).

Sheriff Novacek attempted to take a taped statement from the appellant. He again read appellant his Miranda rights and,

this time, appellant requested to speak with an attorney. Sheriff Novacek then ceased all questioning (T.O.H. 27, 28).

Appellant also testified at the Omnibus Hearing. Contrary to the testimony of law enforcement officers, appellant claimed that the patch of marijuana was approximately 100 feet from his house and that it was impossible to view it from the road. Appellant also testified at length regarding his claim that he had repeatedly requested an opportunity to speak to an attorney. In its Omnibus Hearing Order and Memorandum the court denied appellant's motions to suppress the evidence seized and the statements made by appellant to police.2/ Judge Murphy further held in abeyance any rulings on appellant's constitutional challenges pursuant to defense counsel's request (R.A. 31, 32; T.O.H. 12, 13).3/

Subsequent to the omnibus hearing, defense counsel notified the State that it intended to raise the defense of "medical necessity." In response, the State filed a motion requesting the trial court to preclude admission of any evidence which related to the appellant's alleged epilepsy or alleged use

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2/ The trial court, in its Omnibus Hearing Order and Memorandum dated December 29, 1990, resolved the factual issues regarding the search of appellant's property and the Miranda warnings in favor of the State. While this order was expressly mentioned in the appeal papers (see Appellant's Statement of the Case, Appellant's Appendix 2-4), appellant has chosen not to address these issues in his brief. The State will rely upon the trial court's well reasoned opinion which provides a solid basis upon which to support its decision (R.A. 26-38).

3/ R.A. refers to the Appendix to Respondent's Brief; T.O.H. refers to the transcript of the Omnibus Hearing.

of controlled substances for treatment, on the grounds that such a defense did not exist in Minnesota and that such evidence would be irrelevant and not otherwise admissible (A. 5).4/

In its order and memorandum of March 8, 1989, the trial court granted the State's motion to exclude the defense of medical necessity (A.6-8). The Court's order of March 15 differed only slightly to correct a procedural matter (A. 9-11).

Appellant was then allowed to make an offer of proof to support his motion for reconsideration of the March 15 order. This offer was in the nature of expert testimony presented on March 16, 1990, and by way of appellant's affidavit and exhibits dated March 26, 1990.5/ That testimony is summarized as follows:

The first expert witness to testify on behalf of appellant was Dr. David Rosenbaum. He specialized in neurology, subspecialized in the treatment of epilepsy, and had researched epilepsy (T.O.P. 7)6/

Dr. Rosenbaum testified that he had reviewed approximately 200 pages of appellant's medical records (Id. at 11) and had gleaned from the records that appellant had been diagnosed as having epilepsy since approximately 1956 (Id. at 12).

Dr. Rosenbaum went on to define and describe epilepsy as well as differentiate types of seizures (Id. at 12-15). He then

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4/ A. refers to the appendix to appellant's brief.

5/ Appellant's affidavit is reproduced in respondent's appendix in its totality. However, only exhibits 19-25 are included.

6/ T.O.P. refers to the transcript of the Offer of Proof Hearing.

testified regarding the treatments available for epilepsy and discussed Dilantin, which became available in about 1940. Dilantin apparently had many advantages over phenobarbitol in that it had much less sedative, much less affects on memory and fewer adverse affects on cognition than had phenobarbitol, and was still the most widely used anti-epileptic drug (T.O.P. 16, 17).

He further testified that newer drugs were available. Two such widely prescribed medications are Tegretol and Mysoline (or Primadone in its generic name). The newest drug now in use, however, is called Depakote (or valproic acid) (Id. at 17).

Dr. Rosenbaum found from his review of appellant's medical records, that over the years phenobarbitol, Dilantin, Mysoline, Tranxene and Valium have been prescribed (Id. at 17).

Dr. Rosenbaum then testified regarding the adverse or deleterious side effects associated with the prescriptive medications and that the best evidence would seem to suggest that Dilantin does have some minors effects on slowing of processing and slowing of motor behaviors.

Dr. Rosenbaum testified:

> The two newer medications, Tegretol and Velproid, seem to have little, if no, affects on cognitive functioning, producing sedation, memory problems, etcetera.

Id. at 18.

Dr. Rosenbaum felt that appellant's medical records were "relatively complete" and seemed to indicate that there was a marked decrease in the grand mal seizures since 1980 (Id. at 21, 22).

While a number of nineteenth and early twentieth century physicians and neurologists felt, based on personal experience and observation, that marijuana had a lot of usefulness in treating epilepsy, Dr. Rosenbaum indicated that these opinions came at a time when there were no effective treatments for epilepsy other than bromides, which were just coming into use and which had a lot of toxic side effects (T.O.P. 23, 24).

Dr. Rosenbaum then described two "anecdotal" reports in the medical literature but indicated, "One can't make too much of these kind of anecdotal studies. There is a lot of uncertainties. A lot goes on in life beside these variables" (Id. at 26).

Dr. Rosenbaum then described animal research with marijuana. Since crude marijuana smoke contains literally scores of active and inactive chemicals, the decision was made to use specific substances. The two substances most actively investigated, according to Dr. Rosenbaum, have been delta-9-THC, (which is often said to be the psycoactive component of marijuana) and a substance called cannabidiol, which has no psychological effects -- it doesn't produce sedation and it doesn't produce a high (Id. at 27).

Dr. Rosenbaum first testified regarding THC. He stated:

> In some animals, at some dose levels, under some conditions, THC can be an excitatory agent, that is it can actually promote convulsions, as can Dilantin. But the overall bulk of the evidence would seem to suggest that it probably has, in some, an anticonvulsive or antiepileptic effect.
>
> It obviously hasn't been favored for use as a drug to treat epilepsy or for development for a

> number of reasons. One, because it has the psychoactive effects and we don't want to give a patient a drug to treat a condition which also is going to make them sleepy, groggy, high, uncomfortable, whatever. But, furthermore, there has been some concern about the excitatory effects and whether, in fact, this might actually promote seizures in the occasional patient.

T.O.P. 27, 28.

As to cannabidiol, which has very little toxicity and no excitatory effects, Dr. Rosenbaum testified, "And the consensus in the literature would seem to be that this agent is worthy of investigation for actual use as a drug in the treatment of epilepsy" (Id. at 28).

Dr. Rosenbaum did state that the possibility certainly exists, even not knowing what the exact composition of the marijuana that's being used is, that crude marijuana, or the plant being smoked, could very well have antiepileptic effects in the individual patient" (Id. at 29).

Dr. Rosenbaum was asked if he had formed an opinion, to a reasonable degree of medical certainty, as to whether or not marijuana could be useful in controlled epileptic seizures and he indicated that, "it could be useful" (Id at 30). He was further of the opinion that the decrease in the frequency of appellant's grand mal convulsions was related to his use of marijuana (Id. at 31).

In response to questions by the Court, Dr. Rosenbaum described in further detail Tegretol and Depakote, the two drugs that have recently come out for the treatment of epilepsy. He

explained that, in general, those two drugs have minimal side effects.

> But one of the principal benefits of those two compounds is that they don't produce cognitive impairment, dulling of mantation, memory, sleepiness, in the vast majority of patients that is.

(T.O.P. 33, 34).

Dr. Rosenbaum's review of the medical records showed that appellant had never been prescribed either Tegretol or Depakote, that Tegretol has been available for the treatment of epilepsy since 1974, and that Depakote (or its predecessor Depakene) became available in about 1984 (Id. at 34, 35).

Among specialists in the field, the preference is for monotherapy, treatment with just one drug rather than the combinations because there are "fewer side effects that weigh with better therapeutic potential" (Id. at 35). The combination of drugs being administered at the same time can increase the likelihood and/or the severity of deleterious side effects (Id. at 35). In reviewing appellant's medical records, Dr. Rosenbaum found that there was a brief period of time where the appellant was actually on Dilantin monotherapy, but "it never seems to have been given a long enough trial with control of progressively increasing doses" (Id. at 37).

Appellant's second expert, Dr. Dennis Petro, testified that he owned his own company which was devoted to clinical research of neuropharmacologic drugs. He had previously practiced as a physician in the area of neurology (Id. at 39).

Dr. Petro discussed how drugs are developed in the United States for large pharmaceutical companies and described his former employment with the Federal Drug Administration, where he was part of the group that reviewed Depakene and Depakote (T.O.P. 40-43). He found that Depakene and Depakote work as an inhibitor of seizures and that the compounds have a range of side effects which are tolerable and relatively mild (Id.). He did point out that there have been reports of patients who have died from the drug, but that it involved children in every such case (Id. at 43).

Dr. Petro has found that the delta-THC element of marijuana did show significant benefits to patients with spasticity (Id. at 46, 47). He was also interested in further research on cannabidiol from the point of view of a potentially less dysphoria producing cannabinoid for patients with spasticity (Id. at 49).

Dr. Petro was then asked his opinion, to a reasonable degree of medical certainty, as to whether or not marijuana can be therapeutically useful in controlling epileptic seizures. Dr. Petro responded, "Well, I think again cannabinoids are interesting as a group in this area. I don't have the clinical data at hand to say which one is the best. I think cannabidiol, from my way of looking, given the limited number of ones that have been accessible, is the most interesting because of its lack of an affect on mood." Id. at 54. When asked if he had an opinion, to a reasonable degree of medical certainty, that cannabidiol is

therapeutically useful in controlling epileptic seizures, he responded:

> Oh, again I would say yes in the case of cannabidiol. The reason why I say, in general, marijuana is because it's like one variety of marijuana may be a lot different from another.
>
> Now, if you looked at the risk/benefit ratio of cannabinoids in epilepsy, there are just a whole series of -- a bunch of epilepsies. Again, we went through the issue of specific types. There may be a use for cannabidiol in certain types of seizure problems. And with a -- well, certainly they're interesting to look at, certainly.

T.O.P. 54, 55.

He further stated, "well, I could say the data from the one published paper was encouraging to a neuroscientist to further pursue the characterization of cannabidiol as a therapy for epilepsy" (Id. at 55).

Dr. Petro did testify that he would prescribe marijuana under certain limited circumstances (Id. at 64-69).

Finally, appellant called Robert Randall at his offer of proof hearing. Mr. Randall was president of the Alliance for Cannabis Therapeutics (hereinafter referred to as ACT) (Id. at 70). Mr. Randall testified that he suffers from glaucoma and that he had discovered accidentally that marijuana seemed to be helpful in the treatment of his condition. Mr. Randall testified that after being acquitted of unlawful possession of marijuana in 1976 in the District of Columbia Superior Court he has continued to use marijuana and is provided with marijuana on a legal basis through his physician on the basis of what is called "the compassionate

I.M.D. process." This was developed by the federal government in 1978 to cover his condition and to provide a vehicle to make marijuana available to certain patients under certain conditions which were very highly controlled (T.O.P. 72).

Mr. Randall testified that it might take between 50 and 75 marijuana plants (over 7-1/2 pounds) per year to take care of his prescription. The marijuana he uses is primarily upper leaves and flowering tops, where the active ingredients collect (Id. at 80, 81).

Appellant submitted his affidavit for purposes of his offer of proof. He describes the frequency and severity of his epileptic seizures, and the impact epilepsy has had on his personal and professional life (H.A. at 10-26).7/ He then describes his 34 years of treatment for epilepsy at numerous medical facilities, the types of medications prescribed, and the claimed side effects (Id. at 27-30).

Appellant states how he had met with Dr. Reed, a marriage counselor and a psychologist from Bemidji, who told him that his domestic problems stemmed from the side effects of the prescriptive medications he was taking (Id. at 31). Dr. Reed had apparently told appellant about reading that marijuana had been used medicinally to control epilepsy and suggested to appellant that appellant attempt to wean himself off the prescriptive medications by supplementing them with marijuana (Id. at 32). In

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7/ H.A refers to the **paragraphs** of appellant Hanson's affidavit which are reproduced in respondent's appendix at 1 to 11.

his affidavit, appellant claims that using marijuana to supplement his prescriptive medications allowed him to gradually diminish his reliance on the prescribed drugs (H.A. 38). As he decreased his dependence upon the prescriptive medications, he noticed the deleterious side effects were also diminished appreciably and that his use of marijuana resulted in a significant decrease of both the frequency and severity of his epileptic seizures (Id. at 39, 40). Appellant claims that by supplementing his medicine with marijuana for three years he reduced his use of phenobarbitol to one per day and on Dilantin and Mysoline to two per day (Id. at 41, 42).

Appellant claims that in 1978 his wife mistook his phenobarbitol for aspirin and that she suffered a near fatal overdose (Id. at 43) causing appellant to vow never to have phenobarbitol in his house again. This apparently made it necessary to increase his use of marijuana in order to control his seizures (Id. at 43, 45). Appellant claims that during the years following his wife's near fatal overdose, he was able to gradually diminish his reliance upon the remaining prescriptive drugs by supplementing them with marijuana while, at the same time, decreasing the frequency and severity of his epileptic seizures (Id. at 46, 47).

Appellant acknowledged that in 1982 he was charged with and convicted of growing and possessing marijuana and served approximately two months in jail (Id. at 48, 49). Appellant claims that while he was incarcerated he had to rely solely upon

prescriptive medications and that the frequency and severity of his seizures increased dramatically while incarcerated (H.A. 50). Appellant further claims that after being released from jail he was placed on probation during which time he continued to grow and use marijuana, despite knowing that such conduct could have resulted in the revocation of his probation. Id. at 52. He further explained how he acquired marijuana and how and why he started growing marijuana (Id. at 54-56).

Appellant maintained that several years of growing marijuana had taught him that he needed to plant approximately 40 plants to yield a one year supply of marijuana capable of providing for his medical needs (Id. at 57), and, in the spring of 1988, planted his usual crop of 40 plants (Id. at 58). Due to a drought, however, appellant states that the plants' growth were stunted, causing him to run short of supply and to purchase marijuana from other individuals (Id. at 59, 60). Appellant acknowledged that in 1989 he planted approximately 120 plants (Id. at 62).

Appellant summarized his use of prescription drugs and marijuana since his arrest in July of 1989 and what he claims to have been the physical effects on him (Id. at 64-69). He felt that marijuana has been effective on his epileptic seizures and on the deleterious side effects of medication (Id. at 70-72). Appellant also claims that the marijuana seized from him in July of 1989 was intended to be used solely by him and only for medicinal purposes, that he did not intend to sell or otherwise

transfer it to anyone else, and that he did not intend to use it for mere recreational purposes (H.A. at 73). Finally, appellant claimed that none of his prescriptive drugs have been as effective as marijuana in controlling his epileptic seizures and that, unlike those prescriptive drugs, he has not experienced any deleterious side effects from his medicinal use of marijuana (Id. at 80).

After this offer of proof hearing the trial court issued its order and memorandum of April 6, 1990, which incorporated its memorandum of March 8 (A. 12-16). The court examined whether the offer of proof made by the appellant would be admissible at trial and whether it was enough to show that medical necessity could be a defense in this matter. The court concluded that the defense of medical necessity was not available to appellant on this charge (Id. at 13).

Appellant's subsequent request that the trial court certify the matter to the Court of Appeals was denied in its order of April 10, 1990 (R.A. 23). The court clarified its previous rulings pointing out that the court was ruling against the medical necessity defense based upon the facts of this case, not in general (Id.). Appellant sought discretionary review of this order which was denied by an order of this Court in State v. Hanson, No. CX-90-847 (May 1, 1990) (R.A. 24).

Appellant then waived his right to a jury trial, stipulated to the facts contained in the complaint, police reports and Omnibus Hearing and submitted the matter to the court pursuant

to State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980)8/ (T.G.S. 2-6).9/

The defendant was found guilty by the court of both charges. However, the court found that both counts were part of the same behavioral incident and sentenced him only under Count I of the complaint which was the charge of manufacture of a controlled substance (T.G.S. at 7).

Appellant appeals his convictions, claiming error by the trial court in rejecting appellant's offer of proof on the defense of medical necessity.

ARGUMENT

I. THE ISSUE OF WHETHER THE DEFENSE OF MEDICAL NECESSITY SHOULD BECOME THE RULE OF LAW IN MINNESOTA IS NOT PROPERLY BEFORE THE COURT.

Appellant has appealed from the trial court's order granting the state's motion to exclude the defense of medical necessity which was entered on March 16, 1990. The order is actually dated March 15 and will be referred to as such herein (A. 9-11).

However, appellant failed to point out in his brief that the order appealed from was subsequently modified and clarified by

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8/ In Lothenbach, the Minnesota Supreme Court recognized the practical reality of a procedure whereby the defendant may waive a jury trial and stipulate to the prosecution's case, thus avoiding a lengthy trial while preserving the right to appellate review.

9/ T.G.S. refers to the transcript of the finding of guilt and sentencing of June 22, 1990.

the trial court in its subsequent orders. As the trial court specifically stated in its order of April 10:

> The defendant's request in this matter is much broader than the Court's ruling, which is very narrow. The Court's ruling is that the defendant, under the particular facts of this case, is not entitled to the defense of medical necessity. At no time did the Court infer that the possibility of the defense of medical necessity is not available under any circumstances in the State of Minnesota.

R.A. at 23.

In its April 6 order (A. 12-16), the trial court specifically reviewed the facts of this case utilizing the very standards that appellant urges this Court to adopt (A. 15, 16). While the State maintains that the broad "medical" necessity defense proposed by appellant does not exist in Minnesota, the trial court's analysis renders the issue moot for purposes of this case.

This Court should reject appellant's attempt to create an issue that does not remain. No legitimate reason exists for the Court to go beyond the specific facts and law of this case. As set out more fully below, the trial court's evidentiary rulings on the defense of medical necessity are fully supported in fact and law.

II. MEDICAL NECESSITY IS NOT A DEFENSE TO A CRIMINAL ACTION PURSUANT TO MINN. STAT. § 152.09, SUBD. 1(1), UNDER THE FACTS OF THIS CASE.

While medical necessity has been utilized as a defense to the criminal possession of controlled substances in some jurisdictions, it has not been recognized by the appellate courts in Minnesota.

The general defense of "necessity" is available as a defense to criminal charges in the State of Minnesota under certain circumstances. See State v. Johnson, 289 Minn. 196, 183 N.W.2d 541 (1971). However, the defense is very limited and does not permit a "medical" necessity defense under facts such as those presented here, where defendant has ample opportunity and access to alternative forms of medical treatment. Furthermore, a defendant has the burden of establishing the elements of the defense to the court before it may go to the finder of fact.

Appellant correctly points out that the Minnesota Supreme Court, in State v. Johnson, supra, recognized that the defense of "necessity" existed in the common law in Minnesota and other jurisdictions.

However, even a cursory reading of that decision makes it clear that the defense is limited and that the Supreme Court is unwilling to expand it to the dimensions sought by appellant.

In Johnson the defendant was convicted of operating a snowmobile upon the shoulder of a trunk highway in violation of Minn. Stat. § 84.87, based upon stipulated facts. The trial court

refused to permit the defendant to avail himself of the defenses of necessity and reasonableness. On appeal, the Supreme Court upheld the trial court, holding that:

> Where courts have dealt with the defense of necessity, it has been held that the defense applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question . . . To allow the defense, the choice of action must be necessitated by an emergency.

Johnson, 289 Minn. at 199, 183 N.W.2d at 543 (emphasis added).

The Minnesota Supreme Court briefly reviewed the history of the defense in other jurisdictions and then focused on the defense of necessity in Minnesota, stating:

> In Minnesota the defense of necessity has been incorporated into several criminal statutes by the legislature. See, Minn. Stat. § 243.52; 609.06; 609.065; and 609.765. In 21 Am. Jur. (2d) Criminal Law, § 99, it is stated that there is some authority to the effect that an act done from compulsion or necessity is not a crime; but the necessity or compulsion which will excuse a criminal act must be clear and conclusive and must arise without negligence or fault on the part of the defendant. Thus, it has been held that the defense of necessity is not available, at least where the defendant could have avoided the emergency by taking advance precautions.

Id. 289 Minn. at 201-02, 183 N.W.2d at 544 (emphasis added). See also Minn. Stat. § 609.08 (necessity defense of duress).

The Minnesota Supreme Court agreed that defendant had failed to establish that an emergency existed and held:

> The instant case is therefore not one for which the common-law defense of necessity should be made available. **Its use is simply not merited, either factually or generally, under existing law in this or other jurisdictions.**

Id. 289 Minn. at 202, 183 N.W.2d at 545 (emphasis added).

In State v. Brechon, 352 N.W.2d 745 (Minn. 1984), the Minnesota Supreme Court, again discussed the defense of necessity.

Brechon involved the prosecution of a number of Honeywell protesters charged with trespass who raised "claim of right" and necessity defenses. A three judge panel held that a pretrial offer of proof had to be made as to the claim of right defense, that the defendants' testimony as to beliefs was irrelevant, and that the necessity defense may not be raised at trial.

The Minnesota Supreme Court reversed the appellate panel's order requiring the offer of proof on the claim of right defense, finding that claim of right evidence tends to disprove an essential element of the State's case: that the actor trespassed without claim of right. Id. at 750.

In a footnote, however, the Court distinguished "claim of right" from necessity."

> The district court appellate panel ruled that defendants must establish the four elements of a necessity defense outlined in United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), cert. denied, 459 U.S. 1147, 103 S. Ct. 789, 74 L.Ed.2d 995 (1983), in an offer of proof. Defendants have denied any intention to raise a necessity defense. They need not, therefore, meet the Seward requirements to present claim of right evidence. Claim of right evidence, as part of the state's case is distinguishable from the necessity defense involved in such cases as Seward (defendants failed in offer of proof to meet requirements for necessity defense); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972) (defendants sought to introduce evidence regarding a justification defense); United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972) (defendants contended court erred in refusing

> to submit defense of justification to the jury); Cleveland v. Municipality of Anchorage, 631 P.2d 10973 (Alaska 1981) (anti-abortion protesters claimed their actions were necessary to avert imminent peril to life); State v. Marley, 54 Hawaii 450, 509 P.2d 1095 (1973) (Honeywell protesters contended they should be exonerated because the necessity defense applied to their actions); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983) (defendants argued the harm caused by their trespass was outweighed by the harm they acted to prevent).

Id. at 751, footnote 3.

The four Seward factors that a defendant would have to establish in an offer of proof before the defense could be raised are:

> 1) A direct causal relationship between the defendant's actions and the avoidance of the perceived harm.
>
> 2) The act to be prevented by defendant's conduct was criminal under the law of the United States.
>
> 3) The alleged criminal act which defendants wanted to stop was one occurring in their presence, and was one which would subject them to immediate harm which a reasonable man would think could be eliminated by defendants' conduct.
>
> 4) There was no alternative available to defendants to accomplish their purpose which did not involve a violation of the law.

687 F.2d at 1273, 1274.

In support of appellant's efforts to present a medical necessity defense in this case, he urged the trial court to adopt the standards for the defense as set out in an unpublished trial court decision from the District of Columbia: United State v.

Randall, 104 Daily Wash. L. Rptr. 2249 (D.C. Super. Ct. 1976) (A. 19-23). However, even if Randall were to be applied, the trial court herein noted that medical necessity cannot be used to shield an actor from criminal responsibility if: (1) the duress or circumstance has been brought about by the actor himself; (2) the same objection could have been accomplished by a less offensive alternative which was available to the actor; or (3) the evil sought to be averted was less heinous than that performed to avoid it. Order of April 6, 1990 at A. 15-16.

While the trial court found that appellant did not bring on the epilepsy himself, it specifically found that the appellant did not meet the second factor, i.e,., that there were alternatives available to avoid the criminal conduct. The trial court's findings supported that conclusion. First, the court found that appellant was not on monotherapy long enough to determine its effectiveness. Next, appellant had not used the two new drugs that were available, namely, Tegretol and Depakote. Third, the court found that neither Dr. Rosenbaum nor Dr. Petro would testify, with medical certainty, that marijuana would take care of the appellant's seizure problems. Id.

The trial court found more troubling the fact that appellant was growing three to four times as many plants as even appellant claimed was necessary to meet his medical needs. The court rejected appellant's drought rationale and, likewise, rejected his offer of proof. Id. at 15, 16. The State's motion to preclude the medical evidence was granted. Id. at 12.

It is well settled in Minnesota that rulings on evidentiary matters lie within the broad discretion of the trial court. Absent a clear abuse of discretion, such rulings must stand. State. v Kelly, 435 N.W.2d 807 (Minn. 1989).

The trial court's order to preclude this defense is fully supported by the record. The trial court set forth numerous excerpts from the testimony. The court particularly detailed the equivocal opinions of the experts who testified (A. 13-15).

Dr. Rosenbaum failed to testify that marijuana could best control Mr. Hanson's epilepsy. He specifically differentiated between raw marijuana and some of the more specific substances that make up marijuana and pointed out serious downsides to the use of raw marijuana and one of its more active components, delta-9-THC (T.O.P. 26-28).

Both Drs. Rosenbaum and Petro outlined several alternative treatments available to the appellant that would provide relief from the epileptic seizures and which would avoid the deleterious side effects (see detailed discussion at p. 9, 11, 12, 13, infra).

It is clear, therefore, that the trial court's order precluding the offer of proof in the present case was amply supported by the record. In any event, appellant was not precluded from testifying on his own behalf relative to his medical condition and his marijuana use. Had he gone to trial he could have done so under the Order of this Court denying

discretionary review in State v. Hanson, No. CX-90-847 (May 1, 1990) (R.A. 24).

In addition to the equivocal evidence regarding appellant's alleged medical need for marijuana, the exhibits attached to appellant's affidavit are revealing.

In appellant's letter of May 10, 1979 (R.A. 19), appellant wrote that he first experimented with marijuana after he came upon an article, not upon recommendation from a doctor, as alleged in his affidavit. His affidavit refers to him getting off phenobarbitol in 1978 after his wife allegedly overdosed. He makes no reference to that incident in his letter. Further, at the point that his wife accidentally overdosed, appellant was down to one phenobarbitol per day (R.A. 5, 6). Instead of clearly marking the bottles of pills, he chose to substitute more marijuana for his prescribed medication.

Appellant's letter of November 15, 1983 refers to using marijuana for relaxation purposes (R.A. 21, 22). This corroborates statements made to Sheriff Novacek (T.O.H. 25, 59).

Appellant's letter of March 11, 1977, indicates that he specifically discussed his use of marijuana with a medical doctor, Dr. Jenecky, who indicated that until such time as the medicinal use of marijuana was proven, he must return to prescription drugs (R.A. 2). Amazingly, however, appellant maintains in his brief that appellant should be commended for his marijuana use because a doctor recommended it (appellant's brief at 6, 40).

It must be remembered that the officers herein seized 120 plants. This was three to four times the amount "necessary" to meet appellant's "needs." Even if appellant absolutely needed some marijuana, the possession/manufacture of this amount clearly was not medically necessary. The trial court properly rejected appellant's reasoning on this point (A. 16).

In addition to small amounts of marijuana found all over appellant's residence, officers also found a triple beam scale (T.O.H. 77) -- further evidence that appellant was using the marijuana for other than medicinal purposes.

Under the facts and under the law of this case, as determined by the trial court, the trial court's discretion in precluding appellant's offer of proof was properly exercised.

Whether the standards of a necessity are couched in terms of Johnson, supra, Brechon, supra, Seward, supra, or Randall, supra, the appellant has failed to meet his burden of raising a necessity defense under his offer of proof. The court found that there were reasonable alternatives that were available to him. Appellant attempts to justify his conduct based upon the advice of a marriage counselor and his own experimentation. There is nothing in the record to support his claim that all reasonable alternatives have been exhausted or that advance precautions failed. The only precaution taken here was the growing of corn to hide his growing operation (T.O.H. 113).

The trial court's evidentiary rulings on this point are well supported and must be affirmed.

III. THE EXPANSION OF THE DEFENSE OF NECESSITY SHOULD OCCUR ONLY BY LEGISLATIVE ACTION.

While the Minnesota Supreme Court in Johnson, supra and Brechon, supra seems to have acknowledged the availability of a common law necessity defense, the Minnesota legislature has specifically preempted the law on the available uses of marijuana in this state. Even though the trial court in this case adopted the standards of United States v. Randall, supra, this Court would have no basis for recognizing the applicability of that defense beyond the peculiar facts of this case.

Appellant was convicted and sentenced for a violation of Minn. Stat. § 152.09, subd. 1(1). That section provides:

> Except as otherwise provided in this chapter, it shall be unlawful for any person, firm or corporation to
>
> (1) Manufacture, sell, give away, barter, deliver, exchange or distribute; or possess with intent to manufacture, sell, give away, barter, deliver, exchange or distribute a controlled substance.
>
> "Manufacturing" in places other than a pharmacy, means and includes the production, quality, control, and standardization by mechanical, physical, chemical, or pharmaceutical means, packing, repacking, tableting, encapsulating, labelling, relabeling, filling or by other process, of drugs. Minn. Stat. § 152.01, subd. 7 (1988).

(Emphasis added).

The statute is prohibitive in nature, rather than permissive. The legislative intent was to prohibit the possession or manufacture of controlled substances, except as otherwise provided in chapter 152. The exception for marijuana, a

Schedule I controlled substance, was found in Minn. Stat. § 152.21 (1988), the THC Therapeutic Research Act.

Minn. Stat. § 152.21, subd. 1(1988) provided:

> The legislature finds that scientific literature indicates promise for Delta-9-Tetrahydro-cannabinol (THC), the active component of marijuana, in alleviating certain side effects of cancer chemotherapy under strictly controlled medical circumstances.
>
> The legislature also finds that further research and strictly controlled experimentation regarding the therapeutic use of THC is necessary and desirable. The intent of this section is to establish an extensive research program to investigate and report on the therapeutic effects of THC under strictly controlled circumstances in compliance with all federal laws and regulations promulgated by the Federal Food and Drug Administration, the National Institute on Drug Abuse and the Drug Enforcement Administration. The intent of the legislature is to allow this research program the greatest possible access to qualified cancer patients residing in Minnesota who meet protocol requirements. The establishment of this research program is not intended in any manner whatsoever to condone or promote the illicit recreational use of marijuana.

It can be seen that the Minnesota Legislature intended to allow marijuana cultivation and possession only in connection with cancer research and, only then, under strictly controlled circumstances which are more specifically spelled out in the statutes. The THC Therapeutic Research Act was adopted by the legislature in 1980. The act was amended in 1988 and again in 1989. In 1989, amendments were passed, effective August 1, 1989, or approximately four days after appellant's arrest. The 1989 amendments specifically referred to exemptions from criminal

sanctions. See Laws of Minnesota, ch. 665, s. 2 (1988) (R.A. 25). It is clear, therefore, that at the same time that the appellant was continuing his illegal course of conduct, the Minnesota Legislature declined to expand the scope of research and experimentation regarding the therapeutic use of THC to spasticity, glaucoma or epilepsy, or other possible medical conditions.

The legislature has forbidden other uses of marijuana without regard to the intention, knowledge or motive of the possessor/manufacturer. This is an authorized form of legislative action. State v. O'Heron, 250 Minn. 83, 83 N.W.2d 785 (1957). Where a statute designates an exception, the exclusion of one thing includes all others. Maytag Co. v. Commissioner of Taxation, 218 Minn. 460, 17 N.W.2d 37 (1944).

As pointed out by the trial court in its orders of March 8, March 15, and April 6, 1990, the legislature has obviously considered whether marijuana could be used for medicinal purposes (A. 6-16). This is not the first time appellant has challenged the right of the legislature to determine which controlled substances have medicinal value and how these substances should be classified. See State v. Hanson, 364 N.W.2d 786 (Minn. 1985). It is not for the court to circumvent the legislature on these issues. The State respectfully submits that judicial amendment of the statutes is not warranted either in general or as applied to appellant.

Regarding statutory authority, the decision of the Supreme Court of the State of New Jersey in State v. Tate, 505 A.2d 941 (N.J. 1986) is quite instructive.

In Tate, the defense of medical necessity was raised in response to a charge of possession of marijuana. The trial court denied the State's motion to strike the defense and the intermediate court of appeals affirmed. However, the Supreme Court of New Jersey found that the legislature, had by statute, specifically restricted the available necessity defenses. Further, it recognized that the New Jersey Legislature had also enacted a therapeutic research act. The court held:

> The legislature has weighed the competing value of medical use of marijuana against the value served by prohibition of its use or possessions, and has set forth the narrow circumstance under which that competing value may be served. Outside those narrow circumstances, the value of the medical use of marijuana cannot be deemed to outweigh the values served by its prohibition.

Id. at 946.

The Court further pointed out that the New Jersey Legislature had given consideration to possible medical uses of controlled dangerous substances by providing that certain substances may be possessed with a valid prescription. The Court stated:

> Because defendant did not possess a valid prescription, he could not claim the protection of this statutory exception. And because the legislature provided this exception dealing with the specific situation presented here, this court is without authority to fashion an alternative exception for defendant under the codes' 'necessity' section.

Id. at 945 (other citation omitted).

New Jersey classified marijuana in Schedule I which, by definition, precluded a prescription, unless the therapeutic act provided for it (which it did not). The same is true in Minnesota. The New Jersey Supreme Court stated:

> Because the defense of 'medical necessity' is clearly precluded by statutory language, we need not look to the common-law defense of 'necessity' for guidance. This Court's common-law gap filling authority with regard to the criminal law should be exercised only when there is in fact a gap to be filled. There is none. Moreover, even were we to resort to the common law, we conclude, contrary to the position of our dissenting colleagues, that even under common law, a 'necessity' defense would not be available in this case.

Id. at 945, 946.

"Obviously, then, the defense is available at common law only when the legislature has not foreseen the circumstances encountered by a defendant." Id. at 946.

"Where the statute itself fixes the exceptions to the operation of the law, the court cannot make any addition." Id.

As previously set forth in State v. Johnson, supra, the Minnesota Supreme Court has found that the common law defense of necessity has been incorporated into several criminal statutes by the legislature. In addition, the legislature enacted and amended its therapeutic research act. The constitutionality of classifying marijuana as a Schedule I substance and the power of the legislature to so classify has been upheld. See State v. Hanson, 364 N.W.2d 786 (Minn. 1985); State v. Vail, 274 N.W.2d 127

(Minn. 1979); United States v. Fogarty, 692 F.2d 542 (8th Cir. 1982), cert. denied, 460 U.S. 1040, 103 S. Ct. 1434 (1983). The legislature has made its intent clear. The court should not endeavor to expand the necessity defense.

Appellant also relies on State v. Bachman, 595 P.2d 287 (Hawaii 1979). First, Hawaii had a statute in place that allowed this type of defense to be presented. Hawaii statute section 703-302, entitled "Choice of Evils," specifically set out criteria which must be met in order to raise the defense. Secondly, the court stated in a footnote that the Hawaii Legislature had recently rejected proposals to decriminalize possession of marijuana.

That court stated:

> It is entirely possible that medical necessity could be asserted as a defense to a marijuana possession charge in a proper case. See HRS § 703-302. See also State v. Horn, 58 Haw. 252, 566 P.2d 1378 (1977). This would require a showing, however, by competent medical testimony, of the beneficial effects upon the defendant's condition of marijuana use, as well as the absence or ineffectiveness of conventional medical alternatives. United States v. Randall, supra. Relief from simple discomfort would not suffice. The harm to which the defendant is exposed must be serious and it must be imminent, H.R.S. § 703-302; State v. Horn, supra and medical testimony would be required to show compelling need for its use.

Id. at 288, footnote 1.10/

10/ It should be noted that in Minnesota it is not a crime to possess less than 42.5 grams of marijuana for one's own personal use. Minn. Stat. § 152.09, subd. 1(2); 152.15, subd. 2(5); 152.01, subd. 16 (1988).

The Hawaii Supreme Court, therefore, merely recognized, acknowledged, and deferred to the authority of the state legislature in this area.

As set out above, the facts of the present case do not require the court to fashion a specific remedy for appellant. Appellant has gone off on his own, contrary to medical advice. He has failed to consider reasonable medical alternatives and has told others that he used the marijuana for other than medicinal purposes.

Appellant also cites State v. Diana, 604 P.2d 1312 (Wash. App. 1979), to support his position. This is misplaced. While the Washington Intermediate Court of Appeals adopted the rationale behind the opinion in United States v. Randall, supra,11/ the Supreme Court of Washington in State v. Palmer, 637 P.2d 239 (Wash. 1981), has severely restricted the precedential value of the Diana ruling. In that case, the defendant maintained that

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11/ The Randall court placed special emphasis upon the importance of an individual's right to preserve and protect his own health and body, citing Roe v. Wade, 410 U.S. 113 (1973), and Rutherford v. United States, 399 F. Supp. 1208 (W.D. Okl. 1975). As set out later in this brief, however, Roe v. Wade did not provide for an unlimited individual's right and, in fact, was specifically limited. See, Employment Division Department of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990). In the present case, the trial court adopted the legal criteria for a medical necessity defense as set out in Randall.

In Rutherford, the court found the Federal Drug Administration to have abrogated its responsibility by failing to review laetrile and either approve or disapprove it as a proper prescriptive drug. Without such review, the court found, Rutherford was without court review and, therefore, due process. The Rutherford court then made its own independent

(Footnote 11 Continued on Next Page)

marijuana had accepted medical use and, therefore, the Board of Pharmacy had abused its discretion in not removing it from Schedule I (the similar argument of appellant failed in his previous appeal in State v. Hanson, supra). The court footnoted the decision of State v. Diana, supra stating:

> He does not claim that he has a need for the drug for medicinal purposes. However, the petitioner's standing to raise this issue has not been challenged in this action and in fact the prosecutor waived any objection on that score by stipulating that the petitioner could argue the question.

Id. at 240.

The Palmer Court reviewed all of the expert testimony presented on the medicinal uses of marijuana and concluded:

> Neither the trial court nor the court of appeals found the petitioner's evidence sufficient to refute the finding of the legislature that marijuana has no accepted medical use in the United States. We are in agreement with their evaluation of that evidence. Id.

The Palmer Court then went on to note that its legislature had recently passed the Controlled Substances Therapeutic Research Act wherein it found that recent research had shown that marijuana may alleviate the side effects of chemotherapy and the ill effects of glaucoma. "It set up a

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(Footnote 11 Continued from Previous Page)
findings and conclusions on the medicinal value of laetrile. In the present case, the Minnesota Legislature has reviewed and continues to review the medicinal use of marijuana through the THC - Therapeutic Research Act, supra, and the trial court resolved the medicinal need of marijuana, under the facts of this case, against appellant.

program for further research and for purposes of such research only reclassified marijuana as a Schedule II drug. Id. at 241 (emphasis in original).

> In light of this recent legislative history, we could not say in any event that the Board has breached its statutory duty by failing to reschedule marijuana. Its nonaction appears to be squarely in accord with the express legislative intent. **Had the Board rescheduled the drug, its action would have been superceded by these enactments, retaining the drug in Schedule I for all but research purposes.**

Id. at 241 (emphasis added).

Finally, the court in Palmer held:

> Whatever the legislature may have meant when it used the term, "medically accepted use" it is obvious that, in its judgment, marijuana has not been proven to have such a use. This court has before it no facts which would justify it in overturning the findings of the legislature, whose prerogative it is to decide what extent the use of substances shall be controlled. Id.

It is doubtful that the Washington Supreme Court would expand a medical necessity defense beyond the specific language of its therapeutic research act, without specific legislative intent.

Not only has the Minnesota Legislature codified the defense of necessity into its criminal code, it has further restricted the legal uses of marijuana in its therapeutic act. There is no valid reason in this case for the court to substitute its judgment for that of the legislature.

Finally, in a case of first impression in the State of Florida, State v. Mussika, 14 Fla. L.W. 1 (Fla. Cir. Ct. 1988)

(reprinted at A. 24-27), the trial court accepted a medical necessity defense claim.

The trial court reviewed the defendant's medical history and stated:

> Ms. Mussika has exhausted all of the available glaucoma control drugs and surgical procedures including experimental, alternative treatments. They have simply not worked. In fact, the last experimental surgery that was tried on Ms. Mussika was a disaster, resulting in the loss of her sight in one eye. Thus, not only have the available treatments failed, they have presented grave risks. The preponderance of the evidence in this case clearly indicates that this patients' glaucoma is beyond the reach of available medical therapies.

Id. at A.26.

The facts are easily distinguishable from the present case. Ms. Mussika was in possession of four plants. Her physician testified that all conventional treatment alternatives had been exhausted and that each approved drug was capable of lethal results even if properly administered. (She had not previously been convicted of felony possession of marijuana). Further, prior treatment produced objective disastrous results (loss of eyesight).

In addition to the highly unusual facts of that case, the trial court pointed out that Florida had an absolute prohibition against marijuana's use. The trial court felt that such a sweeping, indiscriminate prohibition was not valid. The court found this to be an "intolerable, untenable legal situation." Id. at 4.

As previously pointed out, however, the Minnesota Legislature has addressed the possible medicinal uses of marijuana in its therapeutic research act and declined to reclassify marijuana from a Schedule I substance. This has been upheld as a proper legislative purpose. See, State v. Hanson, supra (appellant Gordon Hanson's 1985 appeal of his prior marijuana conviction wherein the Minnesota Supreme Court specifically found that it was for the legislature to classify controlled substances and that the retention of the drug in Schedule I for purposes other than research program cannot reasonably be said to bear no rational relation to a legitimate legislative purpose).

Therefore, in contrast to the decision in Mussika, the Minnesota Legislature is in the continual process of addressing the medicinal uses of marijuana.

Since the legislature has enacted a statute which itself fixes the exceptions to the operation of the law, the court should not make any addition. State v. Tate, supra.

IV. THE MINNESOTA STATUTES PROHIBITING MARIJUANA USE AND POSSESSION DO NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS TO PRIVACY, DUE PROCESS OR EQUAL PROTECTION.

Appellant asserts that Minnesota's proscription of marijuana violates his constitutional rights to privacy, due process, and equal protection. Appellant first argues that by prosecuting him for marijuana possession, the State has unreasonably denied him the right to pursue medical treatment,

thereby violating his rights to privacy and due process. Appellant also argues that by allowing the limited use of certain controlled substances in some circumstances, the State has denied him equal protection of the laws. Appellant's claims must fail, not only because he failed to seek a determination of these issues below, but on their merits as well.

The failure to raise an issue in the trial court, even an issue of constitutional magnitude, constitutes a waiver of consideration of the issue on appeal. See, e.g, State v. Hanley, 363 N.W.2d 735, 740 (Minn. 1985) (Sixth Amendment violation); State v. Beard, 288 N.W.2d 717 (Minn. 1980) (Fourth and Fifth Amendment violations). When the defendant has failed to raise an issue below, a reviewing court is free to consider it only if the alleged error was "plain error affecting substantial rights," or if the claim of error relates to "fundamental law," or if the failure to reverse would "perpetuate a substantial and essential injustice in the sense that as a result an innocent man may have been convicted." State v. Malaski, 330 N.W.2d 447, 451 (Minn. 1983). None of the stated grounds for consideration of these issues for the first time on appeal apply in this case, and appellant therefore must be deemed to have forfeited them.

At the omnibus hearing, appellant introduced four motions to dismiss on the grounds that Minn. Stat. § 152.09, subd. 1(1) and 1(2) violate various constitutional rights on their face and as applied (T.O.H. 12). Appellant, however, asked that these motions be held in abeyance because he didn't anticipate "there

being enough evidence upon which the court can rule on these motions" (T.O.H. 13). The trial court accordingly did not rule on these motions and thus, did not consider any constitutional challenges to Minn. Stat. § 152.09, subds. 1(1) and 1(2) (R.A. 31, 36; T.O.H. 12, 13).

Appellant had more than an adequate opportunity to challenge Minnesota's marijuana law on constitutional grounds. His decision not to do so because of a lack of evidence suggests that he considered this challenge to be without merit. This court should reject appellant's attempt to raise a constitutional challenge to Minn. Stat. § 152.09, subd. 1(1) and 1(2) for the first time on appeal.

Even if this court considers appellant's constitutional claims, these claims must fail. The Minnesota Supreme Court expressly ruled on the constitutionality of Minnesota's marijuana possession laws in a previous case involving appellant. In State v. Hanson, 364 N.W.2d 786 (Minn. 1985), appellant argued that the medical profession recognizes marijuana's medicinal value and therefore the classification of marijuana as a Schedule I controlled substance is unconstitutional. Id. at 790. The court rejected this argument, citing State v. Vail, 274 N.W.2d 127 (Minn. 1979), and quoting at length from United States v. Fogarty, 692 F.2d 542 (8th Cir. 1982), cert. denied, 460 U.S. 1040, 103 S. Ct. 1434 (1983).

In Vail, the Minnesota Supreme Court rejected an equal protection challenge to the state's statutory classification of

marijuana as a Schedule I controlled substance. The court concluded that the reluctance of the state board of pharmacy to reclassify marijuana is not arbitrary or unreasonable, and thus not unconstitutional. Vail, 274 N.W.2d at 136. The court noted that this conclusion is consistent with other jurisdictions that have considered equal protection challenges to such classifications. Id. at 136, n. 15.

In Fogarty, the Eighth Circuit considered whether the federal classification of marijuana as a Schedule I controlled substance violates the due process and equal protection mandates of the constitution. Fogarty, 692 F.2d at 547. In addressing this issue, the court first noted that since there is no fundamental right to sell or possess marijuana, the classification of marijuana as a Schedule I controlled substance "must be upheld unless it bears no rational relationship to a legitimate government purpose." Id. at 547 (quoting United States v. Kiffer, 477 F.2d 349, 352 (2d Cir. 1972), cert. denied, 414 U.S. 831, 94 S. Ct. 165 (1973)). The court concluded that the Schedule I classification was not irrational. Id. at 547. In reaching this conclusion, the court expressly noted that the federal courts uniformly view the Schedule I classification of marijuana as rational and not violative of equal protection or due process. Id. at 547, n. 4.

These cases demonstrate that laws prohibiting marijuana possession do not violate the constitutional guarantees of equal protection or due process. Appellant's contention that the

"unique circumstances" in this case nonetheless render Minnesota's law unconstitutional as applied to him is without merit.

Appellant urges this Court to find that the State violated his right to privacy and due process when it prosecuted him for marijuana possession. Appellant's argument is based on his assertion that he uses marijuana for medical reasons and that prosecution for such use denies him the freedom to pursue medical treatment. Appellant, in essence, argues that the right to privacy encompasses his decision to use a controlled substance that he personally believes is beneficial to his heath.

This argument is unpersuasive for several reasons. First, the Supreme Court has never held that the right to privacy includes the right to use a controlled substance. In fact, in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973), which appellant cites to support his privacy argument, the Court explained that the right to privacy is not absolute. Roe, 93 S. Ct. at 727. The court further noted that the privacy right does not grant individuals an unlimited right to do with their bodies whatever they please. Id. Instead, the right to privacy "is not unqualified and must be considered against important state interests in regulation." Id.

It is well established that a state has extensive power to regulate in the area of health and welfare, particularly with regard to drug use. The United States Supreme Court recently discussed the relationship between a state's power to regulate drug use and an individual's constitutional rights. In Employment

Div., Dept. of Human Res. of Oregon v. Smith, 110 S. Ct. 1595 (1990), the Court determined that the first amendment right of religious free exercise does not relieve an individual of the obligation to comply with a valid, neutral law prohibiting conduct that a state is free to regulate. Smith, 110 S. Ct. at 1600-02. The Smith Court held that a state constitutionally may prohibit the use of a controlled substance even though an individual's religion prescribes such use. Id. at 1600-02, 1606.

The reasoning in Smith is applicable to the instant case. Here, appellant asserts that his belief in the medicinal value of marijuana relieves him of his obligation to comply with Minnesota's laws prohibiting marijuana possession. As the Smith Court held, however, an individual's belief, even if that belief directly implicates a constitutional right, does not automatically excuse the individual from compliance with a state law of general application. Moreover, the Smith case involved the exercise of an express constitutional right. If the first amendment right to the free exercise of religion does not excuse an individual from complying with state law, appellant's asserted right to choose a treatment for his epilepsy certainly does not excuse him from compliance with Minnesota's drug laws.12/

12/ The Minnesota Supreme Court, in State v. Hershberger, No. C9-88-2623 (Minn. Sup. Ct. Nov. 9, 1990), recently recognized that the Minnesota constitution provides greater protection for religious liberties than does the first amendment of the federal constitution. The Hershberger Court stated that government actions which do not prohibit religious practices in violation of the federal constitution could nonetheless infringe upon or interfere with religious

(Footnote 12 Continued on Next Page)

Appellant also challenges Minnesota's prohibition of marijuana on equal protection grounds. The Minnesota Supreme Court has stated that the standard of review applicable in reviewing equal protection challenges to Minnesota's marijuana laws is whether "the classification is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective." Vail, 274 N.W.2d at 134. As previously discussed, the Minnesota Supreme Court, applying this standard, has ruled that classifying marijuana as a Schedule I controlled substance does not violate the equal protection guarantee.

Appellant nonetheless argues that the State has denied him equal protection by allowing the limited use of marijuana and peyote (also a Schedule I controlled substance) in certain narrow circumstances while not allowing him to use marijuana to help his epilepsy. Appellant pointed to Minnesota's THC Therapeutic Research Act, Minn. Stat. § 152.21 (1988), which establishes a strictly controlled research program to investigate the therapeutic effects of THC, a component of marijuana, on cancer patients. Appellant also cites Minn. Stat. § 152.02, subd. 2(4) (1988), which allows the use of peyote "in bona fide religious ceremonies of the American Indian church".

(Footnote 12 Continued from Previous Page)
practices, thus violating the Minnesota constitution. In Minnesota, therefore, religious considerations may, in some circumstances, excuse an individual from complying with an otherwise valid state law. In the instant case, however, appellant does not assert a religious basis for his marijuana use. Thus, the Hershberger holding is inapplicable to this case.

Appellant's equal protection argument is meritless. In State v. Whitney, 96 Wash.2d 578, 583, 637 P.2d 956, 960 (1981), the Washington Supreme Court held that the limited placement of marijuana in Schedule II for a research program while retaining marijuana as a Schedule I drug for other purposes is constitutionally permissible. The Minnesota Supreme Court cited the Washington case in its Hanson decision. See Hanson, 364 N.W.2d at 791.

Similarly, the fact that the legislature has exempted religious peyote use from criminal prosecution does not render its decision to prohibit marijuana unconstitutional. The legislature and the state board of pharmacy continually must make policy determinations regarding the classification of drugs. These determinations involve a wide range of judgments on controversial scientific, medical, and social issues. Appellant argues that the decision to allow a limited exemption for sacramental peyote use necessarily compels a decision to allow an exemption for marijuana use in epilepsy treatment. This argument compares apples to oranges and implies that the social, political, and constitutional issues involved in each case are equivalent. Clearly, a legislative decision attempting to accommodate a religious practice does not require legalization of marijuana for epilepsy treatment where the effectiveness of this treatment is, at best, questionable and inconclusive.13/

13/ Moreover, the Minnesota Supreme Court's decision in Hershberger, supra, indicates that religious considerations
(Footnote 13 Continued on Next Page)

Finally, even if this Court were to review Minnesota's marijuana laws under a strict scrutiny standard, the laws clearly would survive strict scrutiny. Under a strict scrutiny analysis, a law will be upheld only if it is necessary to serve a compelling government interest. Essling v. Markman, 335 N.W.2d 237, 239 (Minn. 1983). Here, Minnesota's prohibition of marijuana clearly serves a compelling interest -- protecting the public from the health, welfare, and safety risks associated with marijuana use.

The dispute over the harmful or benign effects of marijuana continues. Appellant is asking this court to make a decision which is preeminently a legislative one. The controversy over marijuana use ultimately must be resolved by the legislature, not the courts.

(Footnote 13 Continued from Previous Page)
may create exemptions from generally applicable laws while other considerations would not create such exemptions. The Court pointed to the expansive free exercise and liberty of conscience language in the Minnesota constitution to emphasize the tremendous protection to be afforded religious freedom. Thus, contrary to appellant's assertion, the Hershberger decision suggests that religious considerations may indeed be entitled to greater weight than other considerations.

CONCLUSION

The trial court specifically restricted its pretrial order of April 6, 1990, to preclude the defense of medical necessity, in this case. As it did not rule on the defense for future cases, this issue is not properly before the court.

On the facts of this case, the court properly exercised its discretion by precluding appellant's offer of proof on the medical necessity of marijuana. Since the court did not preclude appellant from testifying on his own behalf relative to his medical condition and motives for using marijuana, there was no abuse of discretion in this case.

While the Minnesota legislature has been continuing to review the medical value of marijuana, it has maintained its general proscription on its use. Since this is a proper legislative decision, this court should not expand the defense of necessity in this case to judicially legislate additional exceptions.

Finally, the Minnesota Supreme Court has already denied several of appellant's constitutional claims. Assuming these claims are even properly before the court, they must be denied.

Dated: November 13, 1990

Respectfully submitted,

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RESPONDENT'S APPENDIX

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ROSEAU NINTH JUDICIAL DISTRICT

State of Minnesota, File No: K-89-425

Plaintiff,

vs. AFFIDAVIT OF GORDON LEROY HANSON

Gordon LeRoy Hanson,

Defendant.

STATE OF MINNESOTA)
)ss
COUNTY OF ROSEAU)

GORDON LEROY HANSON, being first duly sworn on oath deposes and states:

1. I am the defendant in the above-entitled matter.

2. I was born on March 11, 1938 and am currently 52 years old.

3. I have been married to my wife, Connie Hanson since 1959.

4. I have three children: Pam Bailey, born in 1960; Cara McFarlan, born in 1963; and Derek Hanson, born in 1965.

5. I graduated from Williams High School in 1956 and thereafter obtained a two-year degree in accounting from Aukurs Business School.

6. When I was 18 years old, in November of 1956, I experienced my initial grand mal epileptic seizure.

7. When I awoke in a cold sweat on that November morning, my family members were huddled around my bed, concerned and confused by the convulsions they had just witnessed.

8. I was taken to Dr. Janicki at the Beaudette Clinic, who diagnosed my medical condition as epilepsy.

9. I have suffered from epilepsy for the past 34 years.

10. Due to my epilepsy, I was prevented from enlisting in my country's armed forces.

11. My epilepsy has also caused me considerable difficulty in securing and maintaining steady employment.

12. Over the past 30 years, I have held several odd jobs such as working at a potato warehouse, at the Roseau hospital, at Marvins Window Factory, for the Chippewa Indians and planting trees.

13. My epilepsy has manifested itself primarily in two types of seizures: grand mal and petit mal.

14. My grand mal seizures typically last at least three to five minutes, during which time I experience uncontrollable muscle spasms and a complete loss of consciousness.

15. My grand mal seizures are typically followed by a sense of confusion and disorientation, intense physical exhaustion, aching muscles, pain and several days of severe depression.

16. While experiencing grand mal seizures, I have sustained numerous serious injuries in addition to biting my tongue frequently.

17. For example, during one grand mal seizure, I suffered a broken jaw when I fell to the ground.

18. During another grand mal seizure, I suffered serious burns to my feet which necessitated the amputation of one of my toes.

19. Over the past 34 years, I have experienced more than 100 grand mal seizures.

20. During that same time period, I have experienced several hundred petit mal seizures.

21. Unlike the grand mal seizures, I usually have absolutely no warning whatsoever that a petit mal seizure is about to begin.

22. My petit mal seizures typically last at least one to three minutes, during which time I lose consciousness.

23. Following a petit mal seizure, I typically experience a sense of disorientation and several hours of severe depression.

24. Due to the unpredictability of when my seizures will occur, I am unable and not licensed to drive a motor vehicle.

25. This inability to predict the occurrence of my seizures also inhibits me from going out in public for fear that I might have a seizure.

26. In addition to fearing that I might become physically injured if I were to have a seizure in public, I also fear the embarassment and humiliation I would suffer as a result of experiencing a seizure in public; many people would view my seizure as an indication that I had a mental illness.

27. During the past 34 years I have received treatment for my epilepsy at numerous medical facilities, including the

Beaudette Clinic, Warroad Clinic, Roseau Clinic, University of Minnesota Clinic, Winnipeg Clinic and Grand Forks Clinic.

28. Over that period of time, I was prescribed numerous medications including phenobarbital, mysoline, dilantin, tranxene and valium.

29. These prescriptive medications caused me to suffer various deleterious side effects including extreme drowsiness, moodiness, behavioral changes, irritability, difficulty thinking and severe depression.

30. These adverse side effects almost destroyed my family to the extent that my wife and I had to seek marital counseling and my children on several occasions either ran away from home or were removed from my home by county authorities.

31. When I met with a marriage counselor, Dr. Reed, a psychologist from Bemidji, he told me that my domestic problems stemmed from the side effects of the prescriptive medications I was taking.

32. Dr. Reed told me that he had read that marijuana had been used medicinally to control epilepsy and suggested that I attempt to wean myself off of the prescriptive medications by supplementing them with marijuana.

33. As a result of Dr. Reed's advice, I started to research whether marijuana actually had been used in treating epilepsy.

34. Several organizations, including the National Organization for the Reform of Marijuana Laws and the Alliance for Cannabis Therapeutics, provided me with information

indicating that marijuana could, in fact, be medically useful in controlling the frequency and severity of epileptic seizures.

35. Although I did not save all of the documentary material I have obtained relating to marijuana's therapeutic use in treating epilepsy, I am attaching to this affidavit, as Exhibit Nos. 1 to 14, the material I did save over the years which pertains to this issue.

36. The documentary material attached to this affidavit as Exhibit Nos. 1 to 14 provided me with a reasonable basis for believing that marijuana might assist me in controlling my epileptic seizures.

37. This reasonable belief was subsequently corroborated by my personal experimentation with marijuana.

38. Using marijuana to supplement my prescriptive medications, I was able to gradually diminish my reliance on the prescribed drugs.

39. As I decreased my dependence upon the prescriptive medications, I noticed that the deleterious side effects were also diminished appreciably.

40. In addition to decreasing the adverse side effects, I also noticed that my use of marijuana resulted in a significant decrease of both the frequency and the severity of my epileptic seizures.

41. In 1975, before I started using marijuana medicinally, I was taking three phenobarbital, mysoline and dilantin daily.

42. Within three years, by supplementing the prescriptive drugs with marijuana, I was able to reduce my reliance on

phenobarbital to one per day, and on dilantin and mysoline to two per day.

43. In 1978 my wife, Connie, after consuming alcohol one evening, mistook my phenobarbital for aspirin and suffered a near fatal overdose which rendered her comatose and placed her in the hospital for three days.

44. At that time I vowed to never have that dangerous drug, phenobarbital, in my house again.

45. When I abruptly terminated my reliance upon phenobarbital, I found it necessary to increase my medicinal use of marijuana in order to control my epileptic seizures.

46. During the years following Connie's near fatal overdose, I was able to gradually diminish my reliance upon the remaining prescriptive drugs by supplementing them with marijuana.

47. During this time, the frequency and severity of my epileptic seizures continued to decrease.

48. In 1982, I was charged with and convicted of growing and possessing marijuana.

49. As a result of that conviction, I served approximately two months in jail.

50. While incarcerated, I did not have access to marijuana and, consequently, relied solely upon prescriptive medications to control my epileptic seizures.

51. The frequency and severity of my seizures increased dramatically while I was incarcerated and the deleterious side

effects of the prescriptive drugs returned, causing the jailers to segregate me in solitary confinement.

52. After being released from jail, I was placed on probation during which time I continued to grow and use marijuana for medical purposes, despite knowing that such conduct could have resulted in the revocation of my probation.

53. I believed at that time, and continue to believe, that it is medically necessary for me to use marijuana in order to control my epileptic seizures and avoid the deleterious side effects I experienced from the prescriptive drugs.

54. When I initially began experimenting medicinally with marijuana, I would purchase small amounts from various people who sold it.

55. Eventually, after realizing the therapeutic value marijuana provided in controlling my epileptic seizures, I started to grow my own marijuana.

56. By growing my own marijuana, I sought to achieve several goals: (1) I would avoid contributing to the illegal trafficking of marijuana; (2) I would be certain of having a ready supply of marijuana necessary to control my seizures; (3) I would not risk obtaining, from untrustworthy individuals, impure marijuana that might be contaminated with harmful substances; and (4) due to my limited income, I would be able to afford an ample supply of marijuana required to control my epileptic seizures.

57. Several years of experience in growing marijuana had taught me that I needed to plant approximately 40 plants to yield

a one year supply of marijuana capable of providing for my medical needs.

58. Accordingly, in the spring of 1988, I planted my usual crop of approximately 40 marijuana plants.

59. Due to the severe drought experienced in 1988, however, these plants' growth was stunted to the extent that my marijuana supply lasted only four -- rather than twelve -- months.

60. During the winter of 1989, therefore, I found it necessary to purchase marijuana from potentially unscrupulous individuals involved in the illegal trafficking of that substance.

61. In the spring of 1989, amidst an agricultural forecast of another serious drought, I decided to triple the number of plants I would grow in an effort to ensure that I would have an adequate supply of marijuana between my 1989 and 1990 crops.

62. Because the drought-stunted 40 plant crop of 1988 produced only a four months supply of marijuana, I planted approximately 120 plants in 1989, hoping to ensure a twelve month supply of marijuana.

63. In July of 1989, however, I was again arrested and charged with growing and possessing marijuana.

64. Prior to the winter of 1989, when my supply of marijuana ran low because of the preceding summer's drought, I had successfully diminished my reliance on the prescriptive medications to only one mysoline and dilantin daily.

65. As marijuana became less available, I was forced to increase my reliance on the prescriptive drugs to two mysoline and dilantin daily.

66. After being arrested in July of 1989, when the police seized all of my marijuana, I found it necessary to increase my dosage of mysoline and dylantin to three per day.

67. During the two weeks immediately following my 1989 arrest, I suffered eight seizures and experienced severe depression as a side effect of my increased reliance upon my prescriptive drugs.

68. Eventually, in August of 1989, I obtained a supply of marijuana that lasted for one month, during which time I experienced no epileptic seizures and again decreased my reliance on the prescriptive drugs to one mysoline and dylantin daily.

69. Since September of 1989, however, my supply of marijuana has been uncertain and, consequently, the frequency and severity of my epileptic seizures has increased whenever marijuana is unavailable to me.

70. Based upon my many years of experience in attempting to control my epileptic seizures, I sincerely believe that marijuana has been extremely effective, more so than any of the drugs prescribed for me, in controlling the frequency and severity of my epileptic seizures.

71. Based upon that experience, I also sincerely believe that by supplementing my prescriptive medications with marijuana, I have been able to avoid the deleterious side effects I experienced from the prescriptive drugs.

72. My medicinal use of marijuana has enabled me to virtually eliminate my grand mal seizures and to significantly decrease the frequency of my petit mal seizures.

73. The marijuana seized from me in July of 1989 was intended to be used solely by me and only for medicinal purposes; I did not intend to sell or otherwise transfer it to anyone else and also did not intend to use it for mere recreational purposes.

74. I have always been sincere, open and honest about my medical use of marijuana to control my epileptic seizures.

75. In 1976, thirteen years before I was arrested in 1989, I wrote letters to the editors of local newspapers admitting my medical use of marijuana; I have attached copies of these letters to this affidaivt as Exhibit Nos. 15 and 16.

76. In 1977, twelve years before my 1989 arrest, I sent a form letter admitting my medical use of marijuana to various elected officials and organizations; I have attached a copy of this form letter to this affidavit as Exhibit No. 17.

77. I received replies to that form letter from, among others, United States Senators Hubert Humphrey and Wendell Anderson, United States Congressman Arlan Stangeland, the director of the University of Minnesota's Office of Alcohol and Other Drug Abuse Programming, and the Canadian Broadcasting Corporation; copies of these replies are attached to this affidavit as Exhibit Nos. 18 to 22.

78. In 1979, ten years before my 1989 arrest, I sent a letter to Dr. Art Ulene of the National Broadcasting Company, in which I again detailed my medical use of marijuana; a copy of

this letter and Dr. Ulene's reply are attached to this affidavit as Exhibit Nos. 23 and 24.

79. In 1983, six years before my 1989 arrest, I sent a letter to Scott Harris, an attorney, in which I again detailed the history of my use of marijuana for medicinal purposes; a copy of this letter is attached to this affidavit as Exhibit No. 25.

80. None of my prescriptive drugs have been as effective as marijuana in controlling my epileptic seizures and, unlike those prescriptive drugs, I have not experienced any deleterious side effects from my medicinal use of marijuana.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Gordon LeRoy Hanson

Gordon LeRoy Hanson

Subscribed and sworn to before me this 26th day of March, 1990.

Mary Jacklin, Deputy Court Clerk.
~~Notary Public~~

March 11, 1977

Short Stuff
c/o SKEPTIC
812 Presidio Avenue
Santa Barbara, California

My slowly faltering convictions of patriotism were changed to feelings of sheer bafflement on July 4, 1976. It was on that date I was arrested for possession of a controlled substance — marijuana.

Marijuana! Yes, I can still remember as I listened in childhood of the terrible tales surrounding the mystique of marijuana. To this day there are still many who believe this molded propaganda originally issued by the U.S. government nearly forty years ago.

Kindly allow me to introduce myself and perhaps then return with me to the year 1956. My name is Gordon Hansen, I am thirty-eight years old and have lived my entire life in northern Minnesota.

My entrance into adulthood was accompanied by a shadow, the shadow which always creeps into the void left in human minds by misunderstanding, ignorance, and fear. Epilepsy never had been fully accepted as just another illness and therefore when I was told by my doctor, in the Fall of 1956, that I actually had this affliction my future felt very bleak. Dr. Janecky, of Baudette, then prescribed the continual usage of Mysoline and Sodium Dilantin to enable the control of seizures.

As my intake of these drugs progressed there began a subtle change in my personality. Looking back now, it all takes on the resemblance of a nightmare - - certainly very unreal. I began to lose my rationalism which in turn allowed my temper to flare up without justification. Meanwhile, along with my misplaced common sense, there was also a loss of those special emotions necessary to fully realize the meaning of love. Needless to say, my wife and children suffered both mentally and physically because of my inability to cope with the unpredictable effects caused by the extended use of prescribed medication.

Medical examinations were necessary to determine drug caused abnormalities such as an increase in my bloods white cell count. Measures were then able to be taken to correct most problems but there were things that could not be avoided, things like swelling of the gums around my teeth and, worst of all, the ceaselessness of depression.

Early in the sixties a doctor changed my prescription in two ways. He believed the addition of Phenobarbitol would allow me to decrease my intake of Mysoline and Sodium Dilantin by one third. This procedure did prove to be just as effective in the control of seizures but my tendency to become irritable increased sharply.

Years passing by, I witnessed the erosion of my family unit. My wife began to drink excessively while my children were in continual trouble with either the school or law. Still, I could not comprehend what was wrong — never realizing the problem was in actuality a cancerous situation of my mind that threatened to destroy us all.

Then something happened that miraculously prevented an otherwise inevitable doom of marriage and family. No, it wasn't salvation as delivered through the silverly tongue of some traveling hypocrite living off those he frightens by visions of hell fire. In my case it was the acceptance of what I had learned concerning the use of marijuana as an antiepileptic during the thirties.

Nearly two years have elapsed since I first began to substitute marijuana for 50% of my daily prescribed drugs. I have had the same type of seizure control without the miserable side effects.

Exhibit 17

Once again I can think clearly, feel happiness, know compassion, and perceive love. My wife has decreased her consumption of alcoholic beverages, our children are once again getting good grades in school, and we now can call our house a home.

One problem remains. As a result of my arrest, and subsequent court trial last September, I was found guilty with a fine that was endurable but the stigma still remains. I am now classified as a tainted citizen simply because I use illegal medication.

Shortly after my arrest I spoke with Dr. Janecky and told him in detail what I've mentioned in this letter. He indicated that there may be possibilities in the medicinal use of marijuana but until such use is proven I must return to the larger intake of prescription drugs. When questioned about the adverse effects this medicine had previously caused he simply wrote me out another prescription - this time for Valium to be consumed twice daily - in addition to the original drugs.

I tried taking all prescriptions as instructed for several days and felt as though I were highly intoxicated. I staggered and had difficulty in speaking, when I attempted to read or write I discovered it was accomplished only with considerable effort. During these days I abstained from the use of marijuana but thereafter began to use both the legal and illegal drugs in the same proportions as I had prior to my arrest.

Without permission to use Cannabis Sativa under medical guidance, I face either the return of a zombie lifestyle or a life of forever living in fear of our present system of law.

I believe that further experimentation into the medicinal use of marijuana may eliminate even a larger percentage of the drugs that society demands I should consume merely because the American Medical Association and FDA protect the "legal" drug pushers!

Sincerely,

Gordon Hanson

Gordon Hanson
Roosevelt, Minnesota
56673

United States Senate
COMMITTEE ON
AGRICULTURE, NUTRITION, AND FORESTRY
WASHINGTON, D.C. 20510

April 25, 1977

Mr. Gordon Hanson
Roosevelt, Minnesota 56673

Dear Mr. Hanson:

Thank you for your recent letter and your medical history.

As you know, legislation on the decriminalization of marijuana has been introduced this Congress. I believe that a realistic response by society to the use of marijuana definitely should include the further reduction of penalties under existing laws relating to personal possession and use of marijuana. What is demanded today are extensive programs of drug abuse prevention and rehabilitation, with law enforcement being concentrated on the apprehension and conviction of the professional and criminal traffickers in dangerous drugs.

I am not on the Committee considering these matters. However, I will keep your past history and views in mind should this legislation reach the floor of the Senate for debate.

With best wishes.

Sincerely,

Hubert H. Humphrey

Exhibit 18

United States Senate

COMMITTEE ON THE BUDGET
WASHINGTON, D.C. 20510

June 3, 1977

Mr. Gordon Hanson
Roosevelt, MN 56673

Dear Mr. Hanson:

Thank you for your letter regarding the medical benefits of marijuana.

As you know, there is conflicting sentiment within the medical community as to the exact medical value of marijuana. Though there are claims by users that the drug has relieved various afflictions, these claims have yet to be sufficiently demonstrated in an empirical fashion. Numerous scientific studies are being conducted which attempt to resolve this controversy. Until these studies come forth with solid evidence, I believe that prudence dictates that any Congressional action designed to facilitate the use of marijuana for medical purposes should be delayed until these studies are completed.

Though I don't believe you will find my position completely compatible with your own, I hope we have a common ground of understanding. Your recovery from the malaise which afflicted you as a result of your epilepsy is truly impressive. I thank you for sharing it with me.

Sincerely,

Wendell R. Anderson
U.S. Senator

WRA:jnf

R.A. 000015

ARLAN STANGELAND
7TH DISTRICT, MINNESOTA

COMMITTEES:
GOVERNMENT OPERATIONS
PUBLIC WORKS AND
TRANSPORTATION

Congress of the United States
House of Representatives
Washington, D.C. 20515

OFFICES:
1518 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-2165

M-F BUILDING
403 CENTER AVENUE
MOORHEAD, MINNESOTA 56560
(218) 233-8631

May 23, 1977

Mr. Gordon Hanson
Roosevelt, Minn. 56673

Dear Mr. Hanson:

Please forgive me for not having written sooner, but this has been my first opportunity to do so personally. My Congressional office is fully operational now, and I am catching up on my correspondence.

I have read your interesting case history, and I trust that your situation will improve. If medical research confirms your findings, perhaps marijuana will one day be available on a prescription basis.

If you provide more information on the replanting of Beltrami Island State Forest, I would be glad to check into funding possibilities. You may wish to contact your state representative in this regard since it is a state forest.

With best regards, I am

Sincerely,

Arlan Stangeland

Arlan Stangeland
Member of Congress

R.A. 000016

Exhibit 20

UNIVERSITY OF MINNESOTA
TWIN CITIES

Office of Alcohol and Other Drug Abuse Programming
744 University Park Plaza
2829 University Avenue S.E.
Minneapolis, Minnesota 55414
(612) 376-3150

April 28, 1977

Gordon Hansen

Roosevelt, Minnesota 56673

Dear Mr. Hansen:

First, I must apologize for this delayed response to your letter dated March 7, 1977. Also, I would like to encourage you to continue your efforts, even though I am aware that the obstacles seem insurmountable.

I have forwarded a copy of your letter to Keith Stroup, Director of the National Organization of Marijuana Laws (NORML). NORML is working very hard to decriminalize marijuana and strongly advocates additional research in its medical uses.

The 1977 National Drug Abuse Conference is being held in San Francisco May 5-9, 1977. At this conference, I will head a panel of experts from all parts of the country who will address questions relating to the medical uses of marijuana. The use of marijuana for epileptic seizure control will definitely be a topic of discussion. I will forward any relevant information to you.

Thank you for your continued efforts for legal change.

Sincerely,

Marc G. Kurzman, R.Ph., J.D.
Director

MGK/jl

R.A. 000017

Exhibit 21

Canadian Broadcasting Corporation
Société Radio-Canada

March 16th, 1977

Mr. G. Hanson,
Roosevelt,
Minn. 56673,
U.S.A.

Dear Mr. Hanson,

Thank you for your letter concerning your views on, and experience with, marijuana.

We may be preparing an examination of Canadian drug laws and will most certainly incorporate your correspondence in our research.

Sincerely,

Glenn Sarty,
Executive Producer,
the fifth estate.

R.A. 000018

Exhibit 2:

May 10, 1979

Dr. Art Ulene
NBC Studios
Burbanks, California

Dear Dr. Ulene:

There is a day in early September of 1956 that I shall never forget. It was a crisp northern Minnesota authum day, leaves crunched beneath my feet as I followed the small meandering stream through a fantasy of natural color. Frequently I would stop to pick a cluster of bright crimson berries from a cranberry bush. Upon filling my basket I felt weary and cold and headed home.

That night I retired early — the next moment I recall is one of confusion and an unknown but deep inner fear. . . . .

My parents and brothers surrounded my bed, their eyes filled with extreme concern. My head throbbed violently and my body ached with every muscle movement. These hurts, even though accompanied with nausea, did not compare with that overwhelming feeling of fear stabbing at me from a sea of deepening depression. . . . .

Not knowing what could be wrong I was hurried to see our family doctor. His diagnosis only seemed to make the situation worsen - - - - - EPILEPSY - - how could I have such a "thing"!?

Over a period of time I was prescribed Dilantin, Mysoline, Valium, and Phenobarbital to be taken three times a day. . . . . .

Looking back at those times I now feel as if it involved not myself but someone I intensely hate because of what "he" did toward destroying what pleasant memories should have existed within a family of two daughters, a son, and a lovely wife.

Divorce, or possible worse, seemed to be inevitable until I came upon an article concerning marijuana and its experimental usage in lessening the effects of epilepsy and several other malfunctions of the human body.

Consequently, I have been using marijuana daily for over five years and during this time I have reduced my medication of Dilantin and Mysoline by two thirds and that of Valium and Phenobarbital entirely. My struggle with the barbituate (Phenobarbital) was the toughest but I'm thrilled to remember February 8, 1979 as the last day I swallowed one.

As a result of all this I am more aware mentally and am able to communicate with my family on a rational basis. No longer does my wife need to fear a beating from me because of depressive moods. My children will remember at least a fragment of happiness in their recollections of home life.

I regret not knowing of the benefits marijuana can hold years earlier. Many needless miseries could have been eliminated.

Gordon Hanson
Roosevelt, Minnesota 56673

R.A. 000019

Exhibit 23

June 6, 1979

Mr. Gordon Hanson
Roosevelt, MN 56673

Dear Mr. Hanson:

Thank you so much for sharing your special experience with epilepsy. I'm truly delighted to hear how well you are doing with your most unconventional form of therapy. Needless to say, I am delighted it works for you.

Thank you for your interest in our health reports. Best wishes to you for good health always.

Sincerely,

Art Ulene

Arthur Ulene, M.D.
AU:hs

R.A. 000020

Exhibit 21

November 15, 1983

Scott [illegible] Morris
[illegible]
Law Offices
Minneapolis, Minnesota

Dear Mr. Morris:

Details of a July night in 1982 remain vivid in my mind and probably will trouble me for many more months...perhaps years.

Events concerning that evening have been discussed earlier but still the social consequences continue to grow in a most frustrating manner. Most important of many worries is that of unemployment -- even special work programs have been unsuccessful because of some fear potential employers seem to feel concerning my marijuana use.

One such example was being sponsored by CETA to work as a janitor in the Warroad Clinic -- after being interviewed by the administrator I was asked to report for work the following Monday. Then, just a few hours later, I received a call stating something had come up so that the job was not available. Nearly a month passed before a representative of the Minnesota Job Service told me why -- the administator had been informed of my marijuana usage and expressed concern of my possible entry into their supply of various pills. This is ironic because for years I'd tried to channel myself away from such prescription drugs which were available to me both legally and without cost.

Approximately five years have now passed by since I managed to abandon completely the usage of Phenobarbital and Valium. Reaching this goal was difficult after years of usage. Only through much reading along with the verbal support of several authorities (including doctors) did I dare to even cut back on their use. That near fatal overdose of phenobarbital, mistaken for aspirin, by my wife became the final shove I needed to realize I must never have them in our home again. (1978)

During these years I continued to use marijuana along with a minimum of Mysoline and Dilantin. I'm again able to awaken early and once more feel an enthusiasm for the events of each day that seem to reflect in spirit to those times before I became a pill taker, at age eighteen, because of epilepsy.

Exhibit 25

Now, after my arrest, another worry became that of a legal request for me to see a local doctor who in turn prescribed Tranxene to replace the marijuana — which I had used instead of Valium and Phenobarbital.

This effort to use Tranxene, Mysoline and Dilantin brought back the listless feeling I so hated along with hints toward the irrational behavior my wife so dreaded. Quitting its use was easy but I continued to purchase Tranxene for several months, leaving them set on the shelf, in an attempt to appease my probation officer.

Currently I take two Mysoline (250 mg) tablets and two Dilantin (100 mg) capsules each day instead of the prescribed three. They don't seem to have an effect which one might as readily notice as such was the situation with Phenobarbital ($\frac{1}{2}$ gr) - twice each day, Valium (10 mg) - twice a day, and Tranxene (3.75) - three each day!

Even so I still have to consult doctors for occasional check-ups for such risks as high white cell blood count and dental repair ---- due in part to swollen gums from present prescriptions.

It seems my use of marijuana has not only enabled me to abstain from those prescriptions which left me oblivious to daily obligations but has also brightened my out-look of life to a point where our marriage has found a means to create happiness without that fear of temper out-bursts. My wife doesn't deserve to be forced to live in such a manner again — unless our law permits my medical use of marijuana I fear that she shall leave me as the ultimate alternative.

Even if society will not accept marijuana's medicinal attributes — it should still permit freedom of choice between the legal drugs which are accepted for relaxation and the use of marijuana for the same purpose. This is especially true in a situation such as mine by which I must abstain from alcohol for medical reasons.

Contrary to public opinion, marijuana has never caused temptations for me to use tobacco, alcohol, nor any other drug - legal or otherwise - - except for coffee!

Sincerely,

Gordon Hanson

Gordon Hanson
Roosevelt, Minnesota
56673

STATE OF MINNESOTA — IN DISTRICT COURT
COUNTY OF ROSEAU — NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

File No. K-89-425

Gordon LeRoy Hanson,
Defendant.

Defendant, by letter dated April 6, 1990, requested the Court to certify to the Court of Appeals the following question: "Whether the defense of medical necessity exists in the state of Minnesota."

Upon all of the records and files herein, the Court declines to certify such question.

Dated this 10th day of April, 1990.

Dennis J. Murphy
Judge of District Court

MEMORANDUM

The defendant's request in this matter is much broader than the Court's ruling, which is very narrow. The Court's ruling is that the defendant, under the particular facts of this case, is not entitled to the defense of medical necessity. At no time did the Court infer that the possibility of the defense of medical necessity is not available under any circumstances in the state of Minnesota.

DJM

jms

STATE OF MINNESOTA

IN COURT OF APPEALS

Gordon LeRoy Hanson,

Petitioner,

vs.

State of Minnesota,

Respondent.

ORDER

CX-90-847

Considered and decided by Parker, Presiding Judge, Crippen, Judge, and Gardebring, Judge.

Based upon the file, records and proceedings herein, and for the following reasons:

Petitioner seeks discretionary review of an order granting the state's motion to exclude the defense of medical necessity in this prosecution for possession of marijuana. The state has not responded to the petition.

Petitioner cites no reported cases recognizing medical necessity as a defense to marijuana possession. Cf. United States v. Fogarty, 692 F.2d 542, 547-48 (8th Cir. 1982), cert. denied 460 U.S. 1040 (1983) (marijuana was properly classified as a controlled substance despite claimed medicinal uses). The trial court heard extensive expert testimony, and concluded the medical testimony did not establish marijuana was of more than potential therapeutic benefit to epileptics, nor that petitioner had tried several new legal prescription drugs available to him. The court did not prevent petitioner from testifying that he uses marijuana for therapeutic reasons. See State v. Brechon, 352 N.W.2d 745, 751 (Minn. 1984) (defendant has a due process right to explain his conduct to a jury).

Petitioner has not shown a compelling reason for this court to extend discretionary pre-trial review.

IT IS HEREBY ORDERED the petition for discretionary review is denied.

Dated: May 1, 1990

BY THE COURT

Judge Edward J. Parker

R.A.000024

SWK:jef

CHAPTER 665—S.F.No. 1937

An act relating to crimes; providing for seizure and forfeiture of property used in commission of crime, proceeds of crime, and contraband; creating a presumption that money, precious metals, and jewels found near controlled substances, and vehicles containing controlled substances, are subject to forfeiture; providing for administrative forfeiture of such property with opportunity for judicial determination; providing for summary forfeiture of contraband, certain controlled substances, weapons following a conviction, and certain plants; providing for forfeiture by judicial action of property and proceeds associated with controlled substance violations and designated offenses; eliminating the requirement that forfeiture actions be dismissed if no associated conviction results; providing that a conviction creates the presumption that after-acquired property constitutes forfeitable proceeds of the offense; eliminating the defense of an owner who negligently allowed the unlawful use of the owner's property; providing that the right to forfeitable property passes to law enforcement agencies upon commission of unlawful act; allowing seizure without process incident to a lawful search without a warrant and in other circumstances; allocating the proceeds of forfeitures to law enforcement agencies and county attorneys; including the cost of facilities and improvements in calculating the confinement per diem for the Hennepin county corrections facility; increasing the amount that may be credited to the sheriff's contingent fund; amending Minnesota Statutes 1986, sections 152.205; 152.21, subdivision 6; 383B.128, subdivision 1; 387.212; and 609.531, subdivisions 4, 5, and by adding subdivisions; Minnesota Statutes 1987 Supplement, section 609.531, subdivision 1; proposing coding for new law in Minnesota Statutes, chapter 609; repealing Minnesota Statutes 1986, sections 152.19; and 609.531, subdivisions 2, 3, and 6.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1986, section 152.205, is amended to read:

152.205 **LOCAL REGULATIONS.**

Sections 152.01, subdivision 18, and 152.092 to 152.095~~, and 152.19, subdivisions 1 and 3~~ do not preempt enforcement or preclude adoption of municipal or county ordinances prohibiting or otherwise regulating the manufacture, delivery, possession or advertisement of drug paraphernalia.

Sec. 2. Minnesota Statutes 1986, section 152.21, subdivision 6, is amended to read:

Subd. 6. **EXEMPTION FROM CRIMINAL SANCTIONS.** For the purposes of this section, the following are not violations listed in section 152.09 or 152.15:

(1) use or possession of THC, or both, by a patient in the research program;

(2) possession, prescribing use of, administering, or dispensing THC, or any combination of these actions, by the principal investigator or by any clinical investigator; and

(3) possession or distribution of THC, or both, by a pharmacy registered to handle schedule I substances which stores THC on behalf of the principal investigator or a clinical investigator.

THC obtained and distributed pursuant to this section is not subject to forfeiture under section ~~152.19~~ 609.531 or sections 11 to 16.

For the purposes of this section, THC is removed from schedule I contained in section 152.02, subdivision 2, and inserted in schedule II contained in section 152.02, subdivision 3.

STATE OF MINNESOTA
COUNTY OF ROSEAU

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
vs.
Gordon LeRoy Hanson,
Defendant.

ORDER
File No. K-89-425

The above-entitled matter came on for an omnibus hearing before the undersigned, one of the judges of the above-named court, on the 13th day of November, 1989 in the courtroom of the Roseau County Courthouse, Roseau, Minnesota.

Mr. Martin Berg, Roseau County Attorney, appeared on behalf of the State of Minnesota.

Mr. Howard Bass, Attorney at Law, Minneapolis, Minnesota, appeared on behalf of the defendant, and the defendant appeared in person.

The Court having heard the evidence adduced at the hearing, together with the exhibits produced and all the records and file herein, makes the following:

FINDINGS OF FACT

1. On July 14, 1989 Sheriff Patrick Novacek and Deputy Robert Porter of the Roseau County Sheriff's office observed 75 to 100 marijuana plants growing in defendant's garden, located in the East One-half of the Northeast Quarter of the Northwest Quarter, Section 1, Township 161 North, Range 35 West, Oaks Township, Roseau County, Minnesota.

2. On July 21, 1989 Sheriff Patrick Novacek and Deputy Jule

Hanson observed the marijuana growing in the defendant's garden.

3. On July 26, 1989 Deputy Robert Porter made an aerial observation of defendant's garden and observed marijuana growing in the garden.

4. At no time did any law enforcement officer physically enter the defendant's property.

5. On July 14 and July 26, 1989 observations were made from the public roadway.

6. On July 26, 1989 Sheriff Patrick Novacek prepared an application for a search warrant and supporting affidavit, which affidavit contained the facts listed above.

7. On July 27, 1989 the search warrant was executed on defendant's residence.

8. Defendant immediately was placed into custody and the Miranda warning was read to him by Sheriff Novacek from a card obtained from Deputy Jule Hanson.

9. Upon completion of the execution of the search warrant, defendant was transported to the Roseau County Law Enforcement Center.

10. Defendant made certain oral confessions and statements after he was placed in custody until Sheriff Patrick Novacek requested that defendant give a taped statement. At this time defendant requested an attorney and all questioning ceased and no further statements were taken from the defendant.

ORDER

1. Motion requiring the prosecution to make disclosures as

required by Minnesota Rules of Criminal Procedure 901 is DENIED on the basis that all disclosures have been furnished.

2. Motion requiring the prosecution to disclose the names and addresses and prior record of convictions within the prosecutor's actual knowledge of persons whom the prosecution intends to call as witnesses at the trial is DENIED on the basis that this has been done.

3. Motion requiring disclosure and allowing the opportunity to inspect and reproduce any relevant written or recorded statements made by witnesses to agents of the prosecution is DENIED on the basis that this has been done.

4. Motion requiring the prosecution to disclose and allow the defendant the opportunity to inspect and reproduce any relevant written or recorded statements made by the defendant is DENIED on the basis that this has been done.

5. Motion requiring the prosecution to disclose the substance of any oral statement made by the defendant, whether before or after arrest, which the prosecution intends to offer in evidence at the time of trial is DENIED, this having been disclosed.

6. Motion requiring the prosecution to disclose and allow the opportunity to inspect and duplicate any papers, documents, photographs and tangible objects which the prosecution intends to introduce as evidence at the time of trial is DENIED on the basis that it has already been granted.

7. Motion requiring the prosecution to make any and all disclosures of any relevant and material information which may possibly relate to the guilt or innocence of the defendant, which may negate or reduce the culpability of the offenses charged, or which may mitigate punishment, and which is not disclosed by the

motion listed in Number 3 above is DENIED on the basis that it has already been given.

8. Motion for an order suppressing any and all evidence taken as a result of search and seizure, together with any evidence obtained as a result of search and seizure, on the ground that such was seized in violation of defendant's constitutional and statutory protections against unreasonable searches and seizures is DENIED.

9. Motion for an order suppressing any and all evidence taken as a result of confessions, admissions or statements in the nature of confessions made by the defendant, together with any evidence obtained as a result of confessions, admissions or statements in the nature of confessions made by the defendant on the ground that the use of such evidence, in any manner, would be in violation of defendant's constitutional and statutory rights is DENIED.

10. Motion for an order suppressing any and all evidence obtained as a result of identification procedures during the investigation, together with any evidence obtained as a result of the identification procedures used during the investigation, on the ground that the use of any such evidence, in any manner, would be in violation of defendant's constitutional and statutory rights is DENIED on the basis that no identification procedures were used.

11. Motion for an order restraining the prosecution from attempting to introduce into evidence at the trial on the general issues any evidence obtained as a result of search and seizure, confessions, admissions or statements in the nature of confessions made by the defendant or as a result of identification procedures during the investigation on the grounds that the notices filed by the prosecuting attorney are vague, ambiguous and unspecific, all to the prejudice of the defendant,

and contrary to the meaning of Minnesota Rule of Criminal Procedure 7.01 is DENIED on the basis that there was no identification and all disclosures have been made by the prosecution.

12. Motion for an order directing the prosecuting attorney to identify and produce any informants who supplied or contributed information to the prosecution, which led to the issuance of the complaint against the defendant is DENIED on the basis that there were no such informants.

13. Motion for an order restraining the prosecution from making any reference at trial to prior convictions, if any, of the defendant, or attempting to introduce such evidence is DENIED on the basis that is premature, but may be renewed at the time of trial.

14. Motion for an order as will promote the fair and expeditious trial of this matter is GRANTED.

15. Motion for an order suppressing any and all evidence on the ground that the initial stop, frisk, detention, arrest, seizure or search of the defendant by the police was made without the officer having probable cause to believe that a crime was committed and that defendant was involved in crime and/or without the officer having reason to believe that the defendant was armed and presently dangerous and involved in criminal activity was withdrawn by the defense.

16. Motion for a combined evidentiary and contested probable cause hearing in advance of trial pursuant to State vs. Florence, 306 Minn. 442, 239 N.W.2d 892 (1976) was granted and such a hearing was held on November 13, 1989.

17. Motion for an order dismissing the complaint on the grounds that it does not substantially comply with the

requirement prescribed by law, all to the prejudice of the substantial rights of the defendant, was withdrawn by the defense.

18. Motion for an order dismissing the complaint on the grounds that there does not exist probable cause to believe that the defendant committed the offense charged in the complaint is DENIED.

19. Motion to dismiss the complaint on the grounds that Minnesota Statute Section 152.09, Subdivisions 1(1) and 1(2), on their face, violate defendant's rights to privacy, personal autonomy, due process of law and equal protection of the laws, as guaranteed by the 4th, 9th and 14th Amendments to the United States Constitution was not heard as defendant requested this motion be held in abeyance.

20. Motion to dismiss the complaint on the grounds that Minnesota Statute Section 152.09, Subdivisions 1(1) and 1(2), as applied to defendant, violate his rights to privacy, personal autonomy, due process of law and equal protection of the laws, as guaranteed by the 4th, 9th and 14th Amendments to the United States Constitution was not heard as defendant requested this motion be held in abeyance.

21. Motion to dismiss the complaint on the grounds that Minnesota Statute Section 152.09, Subdivisions 1(1) and 1(2), on their face, violate defendant's rights to privacy, personal autonomy, due process of law and equal protection of the laws, as guaranteed by Article I, Sections 7, 8, 10 and 16 of the Minnesota Constitution was not heard as defendant requested this motion be held in abeyance.

22. Motion to dismiss the complaint on the grounds that Minnesota Statute Section 152.09, Subdivisions 1(1) and 1(2), as applied to defendant, violate his rights to privacy, personal

autonomy, due process of law and equal protection of the laws, as guaranteed by Article I, Sections 7, 8, 10 and 16 of the Minnesota Constitution was not heard as defendant requested this motion be held in abeyance.

23. Any claims that the statute involved in this proceeding is unconstitutional shall be heard at Roseau, Minnesota at 11:00 a.m. on February 12, 1990.

24. IT IS FURTHER ORDERED that this matter shall be set on the trial term for Roseau County commencing Wednesday, February 21, 1990.

25. The memorandum attached hereto is made a part of this Order.

Dated this 29th day of December, 1989.

Dennis J. Murphy
Judge of District Court

MEMORANDUM

The defendant, in essence, presented evidence on four separate issues: (1) Whether there was probable cause to issue the search warrant; (2) Whether the search warrant was properly executed; (3) That the statements made by the defendant were taken in violation of his Miranda rights; (4) That defendant was denied his right to an attorney and, therefore, any statements made by the defendant should be suppressed.

Issuance of Search Warrant.

Defendant argues that his garden is within the curtilage

area surrounding his home. In Oliver v. United States, 466 U.S. 170, 80 L.Ed 2d 214, 104 S.Ct. 1735 (1984) the Court outlines what expectations of privacy is protected. "The amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable." (Id. at 177, citing Katz v. United States, 389 U.S. 347, 361, 19 L.Ed 2d 576, 88 S.Ct. 507 (1967).

The Court discussed the open fields doctrine and its statements are helpful in determining whether the defendant's garden is curtilage. "Open fields do not provide the setting for those intimate activities that the amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, (emphasis supplied), that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and the police may lawfully survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable". Oliver v. United States, 466 U.S. 179.

Even with "No Trespassing" signs, the garden would be considered an open field. Curtilage has been defined by looking at the proximity of the searched area to the dwelling, the inclusion of the area within the general enclosure surrounding the dwelling, and the use of the area by inhabitants. United States v. Biondich, 652 F.2d 743, 745 (8th Cir.) cert. denied, 454 U.S. 975 (1982).

The facts here show that while the garden was 20 to 30 yards

from the dwelling, there was no enclosure including it within the dwelling. Also, the garden appears to have been used to grow not only vegetables but also a crop of marijuana. This area does not appear to have been intimately linked to the home. There were no physical or psychological links to the garden. Florida v. Riley, 488 U.W. --, 102 L.Ed 2d 835, 109 S.Ct. -- (1989) (O'Connor concurring).

The Court in Florida v. Riley addressed the aerial search of a home and its curtilage. The curtilage question revolved itself around whether a greenhouse, rather than a garden, was curtilage. Although the Riley case was a plurality decision, the Court made some observations concerning curtilage that are helpful to this case. ". . . the home and its curtilage are not necessarily protected from inspection that involves no physical invasion. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Id. at 213 (quoting Katz v. United States, 389 U.S. 347, 351).

The Court did not require the police traveling in the public airways to obtain a search warrant for viewing the curtilage. Contrary to what the defendant argues, compliance with the Federal Aviation Administration Regulations was not the definition of reasonableness of an aerial search. The Court cited the lawfulness of the flight as a factor. Justice O'Connor in her concurrence advocates no mention of the FAA regulations to determine reasonableness.

The four factors the defendant cites from United States v. Dunn, 480 U.S. 294, 94 L.Ed 2d 326, 107 S.Ct. 1134 (1987) reh. denied, 95 L.Ed 2d 579, 107 S.Ct. 1913, are: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) any steps taken to protect the area from observation by people passing by. Even if the first

three factors are conceded to be favorable to the defendant, the fourth factor is not. The steps taken to protect the area from observation by passersby obviously was not great enough to prevent the officers from observing the marijuana plants from a public road.

Even if the Court were to find that the defendant's garden was curtilage and not an open field, the aerial search was not illegal. In California v. Ciraolo, 476 U.S. 207, 90 L.Ed 2d 210, 160 S.Ct. 1809 (1986), aerial observations of a double-walled garden were lawful. The officers used public navigable airspace in a physically nonintrusive manner. The Court stated, [the fact] "that the observation from the aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant." Id. at 213. The garden in California v. Ciraolo was considered curtilage.

The burden the defendant would have the State meet is not apparent upon reading the Ciraolo or Riley cases. As stated previously, the Court found favor with a lawfully operating airplane, but did not hold outright that FAA regulations must be met.

In Minnesota, the Ciraolo case was cited in upholding a flyover inspection conducted in the public airspace. State v. Anderson, 414 N.W.2d 747 (Minn. App 1987). The case of State v. Sorenson, 441 N.W.2d 455 (1989) upheld a search based upon the open fields doctrine.

The Court has found that the garden was not curtilage as it is not linked to the dwelling in any meaningful manner. It is not set apart from the rest of the defendant's farmsite. The defendant sought to obstruct public viewing but he was unsuccessful. Thus, the open fields doctrine should be applied. Even if the garden is considered curtilage, it is still lawful to make an aerial search.

A warrant cannot be issued unless there is probable cause, supported by affidavit, naming and specifically describing the person, place and/or thing to be searched or seized (Minnesota Statute 626.08). In this case the real property description and the areas to be searched were completely described in the search warrant. If there is probable cause to issue the search warrant due to the actual observation of the various officers, this is in conformity with Minnesota Statute 626.10. Because Fourth Amendment protections do not extend to open fields, the officers in this case could have immediately entered defendant's property and seized the marijuana growing in defendant's garden. See Hester vs. United States, 265 U.S. 57 (1924) and Air Pollution Variance Board vs. Western Alfalfa, 416 U.S. 861 (1974). This set of facts would also support a warrantless search as exigent circumstances existed where contraband could be removed or destroyed. The defendant may have become alerted to the observations by the officers. See State vs. Mollberg, 310 Minn. 376, 246 N.W.2d 463 (1976) and United States vs. Evans, 481 F.2d 990 (Ninth Circuit 1973). However, a warrant was issued based on all the observations of Officer Porter. Both the aerial observations and the observations made from the public roadway were sufficient to obtain a warrant in this case. See Florida vs. Riley, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) and California vs. Ciraolo, 476 U.S. 207, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986).

With regard to the execution of the search warrant, the officers previously obtained the right to have a nighttime search and unannounced entry due to the fact that they had probable cause to believe that the defendant was in possession of a felony amount of marijuana, either in the garden or on the premises, on his person or in automobiles at the premises. The manner and method surrounding the cultivation of the marijuana observed by the officers gave them probable cause to believe that defendant was operating as an outlet or warehouse for a drug business. See State vs. Lien, 265 N.W.2d 833 (Minn. 1978) and State vs. Volento, 405 N.W.2d 914 (Minn. App. 1987). After defendant was

placed into custody and read the Miranda warning, he informed the officers where some of the marijuana in his home was located, thereby consenting, at least partially, to the search.

It is undisputed that defendant was immediately read his Miranda rights and no evidence was offered to indicate these rights were given incorrectly. During the course of the search, other people in the household were also arrested and, at that point, defendant admitted all the marijuana was his or belonged to him. No threats or promises were made to the defendant and this statement was made voluntarily without questioning from the officers.

The defendant also raises the adequacy of a second Miranda warning given within five hours of the first complete Miranda warning. This questioning was to be conducted by Sheriff Novacek, who was the same person that read the initial Miranda warning. State vs. Reilly, 269 N.W.2d 343 (Minn. 1978) allowed seven hours to pass between the initial Miranda warning and questioning. Further evidence of defendant's knowledge of his rights occurred when defendant requested an attorney prior to a taped statement. All questioning ceased at this point. There is nothing to necessitate a second complete Miranda warning. Defendant was in police custody the whole five hours. He was aware of the purpose of his arrest. Defendant was asked if he recalled his Miranda warnings and he stated he did. The facts indicate that the defendant's first Miranda warnings were well within the seven hours of State vs. Reilly.

The defendant claims that he requested counsel, starting with his request to Trooper Kastner of the Minnesota Highway Patrol, when defendant was being transported from his home to the Roseau County Law Enforcement Center. Trooper Kastner testified that at no time did the defendant ever request counsel. The defendant testified that once he was in the Roseau County Law Enforcement Center, he requested to use the phone. Defendant's

testimony indicated he did not inform anyone as to why he wanted to use the phone. All officers who came in contact with the defendant during his arrival at the law enforcement center, and until an attempt was made to take a tape recorded statement, adamantly deny that defendant ever made a request for an attorney. In fact, after making certain additional statements while being interrogated at the law enforcement center, the sheriff request that he give a taped statement. When the tape player was started, defendant requested an attorney and all questioning ceased. The State has proved by a preponderance of the evidence that defendant did not request an attorney.

DJM

jms

cc: Mr. Martin Berg
Mr. Howard Bass

C3-90-1628
STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Gordon Leroy Hanson,

Appellant.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. Introduction

Respondent's brief constitutes a disingenuous effort to divert this court's attention from the facts and true legal issues involved in this appeal. Respondent's opening salvo typifies its diversionary strategy: "It is necessary in this case for respondent to present a more complete statement of the case and facts than usual, inasmuch as appellant has failed to state the facts in his brief with complete candor, as required by Minn. R. Civ. P. 128.02, subd. 1(1)." Brief for Respondent at 3. That rule of appellate procedure specifically provides:

> A statement of the case and the facts. A statement of the case shall first be presented identifying the trial court and the trial judge and indicating briefly the nature of the case and its disposition. There shall follow a statement of facts relevant to the grounds urged for reversal, modification or other relief. The facts must be stated fairly, with complete candor, and as concisely as possible.

Minn. R. Civ. App. 128.02, subd. 1(c)(emphasis supplied).

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Respondent's "more complete statement of the case and facts" is replete with "facts" which are totally irrelevant to the grounds urged for reversal. Rather than stating the facts as concisely as possible, respondent injects pages of extraneous material designed to obscure the important points. For example, although this appeal raises no search, seizure or confession issues, respondent allocates four pages of its brief to review omnibus hearing testimony concerning property seized and statements elicited from the appellant. Brief for Respondent at 4-7. An additional eight pages are devoted to highlighting selected portions of the testimony presented at the evidentiary hearing, most of which are similarly irrelevant to the issues on appeal. Id. at 8-15. Using an additional four pages, respondent then simply and selectively reiterates portions of Mr. Hanson's testimony. Id. at 15-18.

Respondent's "more complete statement of the case and facts" also refers to completely irrelevant procedural matters. In a subtle, yet transparent, attempt to attach undue significance to two pretrial rulings, respondent twice alludes to the trial court's refusal to certify the question presented in this case, and this court's denial of Mr. Hanson's subsequent petition for discretionary review. Id. at 2, 18. Neither of these pretrial rulings bears any significance to the issues raised on appeal.

II. The issue of whether the medical necessity defense exists in Minnesota is properly before this court.

Similarly illustrative of respondent's appellate strategy is its confusing argument that this case does not present the issue of whether the defense of medical necessity exists in Minnesota. Unduly relying upon the trial court's memoranda of April 6 and 10, 1990, respondent contends that the trial court actually recognized the existence of the defense. Id. at 19-20. Yet, a careful review of the entire record leaves absolutely no doubt that the trial court excluded Mr. Hanson's medical necessity defense based on its erroneous determination that, as a matter of law, the defense does not exist in Minnesota.

The language of the State's January 4, 1990, motion reveals that it was premised on the belief that, as a matter of law, the defense does not exist in Minnesota:

> The State respectfully moves the Court to exclude any evidence at the trial of this matter regarding the alleged defense which the defendant is terming "medical necessity" and any evidence which relates to the defendant's alleged epilepsy or alleged use of controlled substances to treat the alleged epilepsy, on the grounds that no such defense exists in the State of Minnesota, and this evidence and testimony would be irrelevant and not otherwise admissible under the Rules of Evidence of the State of Minnesota.

Brief for Appellant at A-5 (emphasis added).

The language of the trial court's March 15, 1990, Amended Order similarly reflects that the State's motion sought to exclude the defense on the ground that it does not exist, as a matter of law, in Minnesota:

> The above-entitled matter was submitted to the undersigned, one of the judges of the above-named court, on the motion of the State, dated January 4, 1990, to exclude the defense of medical necessity, upon the basis that the defense of medical necessity is unavailable as a matter of law in Minnesota and both the plaintiff and defendant stipulated that no factual issues exist for purposes of this motion and it was a legal decision.

Id. at A-9 (emphasis added).

The language of the trial court's memorandum, attached to both its March 8, 1990, Order and its March 15, 1990, Amended Order, further demonstrates that Mr. Hanson's medical necessity defense was excluded on purely legal grounds:

> The legislature having considered the use of marijuana for medical purposes, and having developed a research program rather than allowing marijuana to be used for medicinal purposes, has determined, as of this date, that marijuana shall not be used for medical purposes.
>
> ...
>
> This Court will not and cannot overturn the legislative decision that marijuana shall be classified as a Schedule 1 controlled substance, and at this point medical research does not indicate that it has any medicinal purpose.

Id. at A-7, A-8, A-10, A-11.

On March 23, 1990, the trial court conducted a hearing on Mr. Hanson's motion to reconsider its orders excluding his medical necessity defense. Consistent with its previous stipulation that no factual issues existed, the State did not challenge any of the evidence presented by Mr. Hanson. Id. at A-13.

At the outset of the memorandum attached to its April 6, 1990, Order, the trial court again erroneously concluded that the defense of medical necessity does not exist, as a matter of law, in Minnesota:

> It is still the opinion of this Court that the Minnesota legislature has considered the medical uses of marijuana and, with limited exceptions, marijuana has no medical value and therefore has been continued as a Schedule I controlled substance. Incorporated by reference is the memorandum attached to this Court's Order of March 8, 1990.

Id. Despite respondent's contrary assertion, this order neither modifies nor clarifies the trial court's earlier orders. Brief for Respondent at 19-20. In fact, it expressly adopts them.

Apparently assuming arguendo the existence of the defense, the trial court then proceeded to analyze whether the medical necessity defense would be available to Mr. Hanson if it existed. Respondent mistakenly contends that this dictum renders moot the issue of whether the defense of medical necessity exists in Minnesota. Id. at 20. Yet, rather than recognizing the existence of the defense, the April 6, 1990, Order is expressly premised on the trial court's previous determination that, as a matter of law, the defense of medical necessity does not exist in Minnesota.

Four days after issuing its April 6, 1990, Order the trial court denied Mr. Hanson's request to certify to this court the question of whether the medical necessity defense exists in Minnesota. Id. at R.A. 23. In denying this request, the trial court for the first time attempted to limit the scope of its orders excluding the defense by stating:

> The defendant's request in this matter is much broader than the Court's ruling, which is very narrow. The Court's ruling is that the defendant, under the particular facts of this case, is not entitled to the defense of medical necessity. At no time did the Court infer that the possibility of the defense of medical necessity is not available under any circumstances in the state of Minnesota.

Id. Once again, despite respondent's contrary assertion, this language neither modifies nor clarifies the trial court's previous orders. Id. at 19-20.

The brief memorandum accompanying the trial court's April 10, 1990 certification decision cannot seriously be characterized as amending the trial court's three prior orders. This mere refusal to certify is not even entitled an order. Furthermore, the memorandum constitues nothing more than dicta since its contents are completely unrelated to the certification standard. See Minn. R. Crim. P. 28.03 (important or doubtful question of law). More importantly, as previously shown, its contents cannot be fairly reconciled with the record that existed at the time the memorandum was written.

The trial court's assertion that it never ruled, as a matter of law, that medical necessity was not a defense in Minnesota defies logic. Without hearing any evidence of Mr. Hanson's medical condition, the trial court twice granted the State's motion to exclude his defense on the grounds that it did not exist. Its March 8, 1990, Order and March 15, 1990, Amended Order cannot be characterized as limited to the particular facts of this case; no facts had been presented to the trial court and

the memorandum accompanying these orders clearly reveals that they were based upon a purely legal determination. Likewise, its incorporation of this memorandum into its April 6, 1990 Order, reveals that even after hearing Mr. Hanson's medical evidence, the trial court again excluded the medical necessity defense on the grounds that it did not exist in Minnesota.

III. Gordon Hanson sufficiently demonstrated his medical necessity defense in this case.

Respondent unavoidably concedes the existence of the general defense of necessity in Minnesota. See Brief for Respondent at 21. Respondent further seems to concede that the specific defense of medical necessity also exists in Minnesota, provided the defendant does not have "ample opportunity and access to alternative forms of medical treatment." Id. Thus, respondent would recognize Mr. Hanson's necessity defense if reasonable alternative forms of medical treatment were not available to him. Respondent, however, repeatedly argues that reasonable medical alternatives to marijuana treatment were readily accessible to Mr. Hanson. See id. at 25, 28, 35. This specious argument must be rejected.

Respondent identifies two medical alternatives by which Mr. Hanson could have avoided using marijuana to treat his epilepsy: (1) monotherapy and (2) two new prescriptive drugs, Tegretol and Depakote. See id. at 25. Yet, neither constitutes a reasonable alternative to which Mr. Hanson had "ample opportunity and access."

As Dr. David Rosenbaum described at Mr. Hanson's March 16, 1990 evidentiary hearing, monotherapy is a fairly recent treatment philosophy which has become popular only over the last decade (E.T. 36). Under monotherapy a patient's treatment is limited to a single drug, rather than combinations of medications (E.T. 35). Although most monotherapy patients suffer fewer adverse side effects, some respond better to combination therapy (E.T. 35-36). Dr. Rosenbaum's review of Mr. Hanson's medical records indicated that his physicians never placed him on a monotherapy treatment plan long enough to determine whether it would have significantly reduced the deleterious side effects he experienced from the drugs they prescribed to him (E.T. 37).

Dr. Rosenbaum also discussed Tegretol and Depakote, two relatively new antiepileptic drugs (E.T. 32-35). Tegretol became available in 1974 and Depakote in 1984 (E.T. 34-35). Unlike the five antiepileptic drugs prescribed to Mr. Hanson over the past 30 years, these newer drugs cause only minimal side effects (E.T. 33). Yet, Dr. Rosenbaum's review of Mr. Hanson's medical records revealed that his various doctors had never prescribed either of these medications for him (E.T. 34).

Respondent's characterization of monotherapy and the two new antiepileptic drugs as reasonable medical alternatives, to which Mr. Hanson had ample opportunity and access, is fundamentally flawed. First, respondent fails to recognize the distinct possibility that certain prescriptive drugs, which recently became generally available in the United States, might not have been available in Roosevelt, Minnesota -- especially at the time

Mr. Hanson began using marijuana to treat his epilepsy. Second, respondent simply assumes that Mr. Hanson's physicians in Roseau County were aware of the two new antiepileptic drugs and the recent shift in treatment philosophy. Third, and most importantly, respondent seeks to hold Mr. Hanson strictly liable for his physicians' failure to employ monotherapy, or prescribe Tegretol or Depakote to him. Nothing in the record indicates that these purported medical alternatives were available to Mr. Hanson.[1]

Respondent's analysis would require Mr. Hanson not merely to choose a medical alternative that is known to him, but also to choose one unknown to him or his physicians. This analysis would further require Mr. Hanson to pursue a medical alternative unprescribed by his physician. Surely respondent is not suggesting that Mr. Hanson either forge prescriptions for, or break into a pharmacy and steal, the alternative medications his physicians have decided not to prescribe. Yet, assuming that Mr. Hanson was a medical research scholar who was therefore aware of such alternatives, there appears to be no other way by which he could obtain these prescriptive drugs.

The fallacy of respondent's assertion that Mr. Hanson had "ample opportunity and access to alternative forms of medical treatment" is readily apparent. This effort to mislead this court must be rejected.

---

[1]In fact, subsequent to Mr. Hanson's conviction in this case, Dr. Steven McKenzie, his current treating physician refused to prescribe these medications to him. See appendix attached hereto.

Respondent's misplaced reliance upon the trial court's determination that these medical alternatives were available to Mr. Hanson must likewise be rejected. Contrary to respondent's assertion, this determination was not supported by the record. Brief for Respondent at 25-26, 28. In fact, as previously shown, the record demonstrates that this factual finding was clearly erroneous. Moreover, because this determination was obviously influenced by the trial court's erroneous legal conclusion that no medical necessity defense exists in Minnesota, ths court should not defer to the trial court's factual finding. See State v. Continental Oil Co., 218 Minn. 123, 15 N.W.2d 542 (1944), cert. denied, 323 U.S. 803 (1945); Brief for Appellant at 11.

Similarly misplaced is respondent's reliance upon the trial court's finding "that neither Dr. Rosenbaum nor Dr. Petro would testify, with medical certainty, that marijuana would take care of the appellant's seizure problems." Brief for Respondent at 25. This finding was likewise influenced by the trial court's erroneous legal conclusion that medical necessity is not a defense in Minnesota. Not only is this finding clearly erroneous, it grossly misrepresents the record.

When Dr. Rosenbaum was asked whether he had an opinion, to a reasonable degree of medical certainty, as to whether marijuana can be useful in controlling epileptic seizures, the neurologist (who specializes in the treatment of epilepsy) replied: "My opinion is that it could be useful" (E.T. 30). Dr. Rosenbaum also expressed his expert opinion that Mr. Hanson's use of

marijuana has been beneficial in controlling his epileptic seizures (T. 31). Additonally, Dr. Rosenbaum testifed that if marijuana were legal and Mr. Hanson were his patient, he would prescribe marijuana to him (E.T. 32).

Dr. Dennis Petro similarly expressed the opinion that marijuana could be useful in treating epilepsy (E.T. 53-55). Dr. Petro also testified that he would prescribe marijuana as an antiepileptic drug, if it were legal, to someone with Mr. Hanson's medical history (E.T. 64-65).

Respondent also attempts to divert this court's attention from the salient facts and legal issues involved in this appeal by emphasizing extraneous matters. For instance, respondent unduly emphasizes the emergency requirement to the general defense of necessity. See Brief for Respondent at 22. This requirement is wholly inapplicable in the context of the specific defense of medical necessity. See Brief for Appellant at 28. Respondent also allocates two pages of its brief to discussing a footnote of dicta and an entirely inapposite case cited in the footnote. See Brief for Respondent at 23-24.

More troubling is respondent's blatant mischaracterization of a letter written by Mr. Hanson. According to respondent, that letter reflects that Mr. Hanson's physician, Dr. Jenecky, advised him not to use marijuana for medicinal purposes. See id. at 27, 35. That letter, however, simply states that his physician "indicated that there may be possibilities in the medicnal use of marijuana but until such use is proven [he] must return to the larger intake of prescription drugs." Id. at R.A. 13. Far from

constituting advise against using marijuana medicinally, Dr. Janecky acknowledges its potential benefits. It was only due to its legal prohibition that the physician was constrained to continue prescribing the legal medications which were causing Mr. Hanson to suffer deleterious side effects.

Respondent also attempts to divert this court's attention by suggesting that the amount of marijuana and the scale seized from Mr. Hanson prove he was using marijuana for other than medicinal purposes. See id. at 28. Yet, due to the extraordinary drought experienced in 1988 and forecast for 1989, the size of Mr. Hanson's crop was reasonably tailored to fulfilling his annual medical needs. See Brief for Appellant at 9-10. The scale is obviously a remnant from the days during which Mr. Hanson purchased -- rather than grew -- his marijuana; nothing in the record indicates any distribution of marijuana by Mr. Hanson. See id.

Finally, respondent suggests that if the exclusion of Mr. Hanson's medical necessity defense was erroneous, it was harmless error because he could testify at trial regarding his medical conditon and medicinal use of marijuana. See Brief for Respondent at 26. This assertion is incorrect. The trial court granted the State's motion to exclude "any evidence which relates to the defendant's alleged epilepsy or alleged use of controlled substances to treat the alleged epilepsy." Brief for Appellant at A-5. Moreover, deprived of an instruction on the medical necessity defense, such testimony would be meaningless. How the exclusion of the crucial defense could be "harmless" is beyond rational comprehension.

IV. Recognition that marijuana is medically necessary for Gordon Hanson will not constitute judicial legislation.

Respondent's diversionary strategy is best illustrated by its specious argument that this court would usurp the legislature's authority by simply applying the necessity defense to the facts presented in this case. See Brief for Respondent at 29-39. Respondent fails to grasp the critical distinction between statutes promulgated by the legislature and caselaw emanating from the courts. By definition, statutes are laws of general applicability; they apply equally to the entire community. Caselaw, however, involves the specific applicability of the laws to a particular set of facts.

Despite respondent's suggestions to the contrary, Mr. Hanson is not requesting this court to promulgate a law exempting all persons -- or even all epileptics -- from compliance with the prohibition against marijuana use. Mr. Hanson's request is exceedingly narrow. He simply asks this court to apply the recognized law of necessity to the unique facts presented in his case.

Respondent erroneously contends that the Minnesota legislature considered and rejected the existence of Mr. Hanson's medical necessity defense when it "specifically preempted the law on the available uses of marijuana." Id. at 29. This contention reflects respondent's fundamental misunderstanding of the preemption doctrine. Under that doctrine, state legislation is invalid to the extent it conflicts with Congressional statutes. See Blackburn v. Doubleday Broadcasting Co., Inc., 353 N.W.2d

550, 554 (Minn. 1984). Furthermore, preemption occurs only if Congress "has expressed a clear intent to pre-empt state law...." Id. See also Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 810 (Minn. Ct. App. 1984). This case presents no alleged conflict between state and federal law; thus, the preemption doctrine is irrelevant.

Moreover, notwithstanding respondent's contrary assertions, the Minnesota legislature has not expressed a clear intent to abrogate Mr. Hanson's medical necessity defense. Attempting to demonstrate this clear intention, respondent unduly relies upon the legislature's incorporation of the necessity defense into several criminal statutes, and its enactment of the THC Therapeutic Research Act. See Brief for Respondent at 30-33.

Respondent relies solely upon State v. Tate, 505 A.2d 941 (N.J. 1986), and State v. Johnson, 289 Minn. 196, 183 N.W.2d 541 (1971), to support its erroneous conclusion that the Minnesota legislature has codified, and thereby limited the scope of, the common law defense of necessity. See Brief for Respondent at 32-33. Yet, critical distinctions between the laws of New Jersey and those of Minnesota render the analysis in Tate completely inapplicable to the case at bar. See Brief for Appellant at 25-27. Furthermore, far from recognizing the legislative codification of the necessity defense, the Johnson court merely noted that the Minnesota legislature had "incorporated" the necessity defense into several criminal statutes. 183 N.W.2d at 544. To illustrate this partial incorporation of the general principles of necessity, the court cited three statutes

authorizing the use of force under certain circumstances, and one statute concerning criminal defamation. See id. (citing Minn. Stat. §§243.52; 609.06; 609.065; 609.765). When these statutes are compared to the New Jersey statute in Tate, which explicitly codifies and limits the scope of the common law necessity defense, it is immediately apparent that the Minnesota legislature has not codified that common law defense.

Minnesota's THC Therapeutic Research Act similarly fails to nullify Mr. Hanson's defense of medical necessity. Nothing in that statute evinces an intention to preclude courts from applying that defense in unique cases. Without citing any legislative history, respondent merely assumes that the legislature actually considered and rejected other therapeutic uses of marijuana when it limited the scope of this statute to chemotherapy cancer patients. Logic, however, compels a contrary conclusion. It is highly unlikely that the legislature contemplated Mr. Hanson's unique medical situation when it enacted the THC Therapeutic Research Act. This inherent inability of legislatures to envision extraordinary circumstances is precisely why the necessity defense arose and why it must be applied in the instant case. In any case, the courts, including especially appellate courts, have the power to do justice despite legislative action. See In re Matter of Arbitration Between Metropolitan Airports Commission, 443 N.W.2d 519, 523 (Minn. 1989).

Respondent's diversionary strategy is further illustrated by its repeated references to Mr. Hanson's previous case, State v. Hanson, 364 N.W.2d 786 (Minn. 1985), and its suggestion that this appeal challenges the constitutionality of classifying marijuana as a Schedule I controlled substance. See Brief for Respondent at 31, 33-34. This issue is simply not involved in this appeal.

Respondent's reliance on three cases cited by Mr. Hanson is also misguided. Respondent relies on State v. Bachman, 595 P.2d 287 (Hawaii 1979), to support its proposition that this court should defer to the legislature's purported abrogation of the medical necessity defense. See Brief for Respondent at 34-35. In Bachman, however, the Hawaii Supreme Court recognized the existence of the medical necessity defense despite a statute which expressly codified the defense of necessity.

Respondent likewise misrepresents State v. Palmer, 637 P.2d 239 (Wash. 1981), by stating that it "severely restricted the precedential value of" State v. Diana, 604 P.2d 1312 (Wash. App. 1979). Brief for Respondent at 36. Palmer did not involve the issue of medical necessity. The narrow issue in Palmer was the legitimacy of classifying marijuana as a Schedule I controlled substance, despite its therapeutic value for treating some diseases. Unlike Mr. Hanson, Palmer did not claim that he needed marijuana for medicinal purposes. 637 P.2d at 240. Far from restricting its precedential value, the Palmer court cited Diana approvingly for its recognition of the medical necessity defense. Id. at 240 n.1.

Respondent also attempts to distinguish the case at bar from State v. Mussika, 14 Fla. L.W. 1 (Fla. Cir. Ct. 1988), by virtue of Florida's "absolute prohibition against marijuana's use." Brief for Respondent at 38. Yet, due to the exceedingly narrow scope of Minnesota's THC Therapeutic Research Act, the statutory prohibition against Mr. Hanson's medicinal use of marijuana is equally absolute as Florida's prohibition against Ms. Mussika's medicinal use of marijuana.

V. Minnesota's prohibition against Gordon Hanson's medicinal use of marijuana violates his constitutional rights to privacy, personal autonomy, due process and equal protection.

Once again, respondent seeks to divert this court's attention from the facts and issues by raising a nonexistent procedural issue, erroneously contending that Mr. Hanson failed to challenge the constitutionality of prohibiting his medicinal use of marijuana in the lower court. See Brief for Respondent at 40-41. A review of the record reveals the fallacy of this contention.

Prior to the omnibus hearing, Mr. Hanson filed several motions to dismiss the complaint on the grounds that the statutory prohibition against marijuana use, as applied to him, violated his constitutional rights to privacy, personal autonomy, due process and equal protection (O.T. 11-13). Due to the unavailability at the omnibus hearing of expert witnesses, who would testify concerning Mr. Hanson's medical need for using marijuana, he requested that the trial court hold these motions in abeyance until this evidence was presented (O.T. 12-13). The

trial court granted this request. See Brief for Respondent at R.A. 31-32. Subsequently, after hearing this evidence, the trial court implicitly denied these motions by finding Mr. Hanson guilty.

By intentionally distorting the record, respondent seeks to mislead this court into believing that Mr. Hanson abandoned his constitutional challenges to Minnesota's prohibition against his medicinal use of marijuana. Selectively quoting Mr. Hanson's attorney out of context, respondent asserts that Mr. Hanson requested "these motions to be held in abeyance because he didn't anticipate 'there being enough evidence upon which the court can rule on these motions.'" Id. at 40-41. Respondent then asserts that Mr. Hanson's request that these motions be held in abeyance "because of a lack of evidence suggests that he considered this challenge to be without merit." Id. at 41. This preposterous claim ignores the State's clear knowledge that the defense was pursued from the very outset of the proceedings and throughout.

A cursory review of the record immediately reveals the disingenuous nature of these assertions. In requesting that these motions be held in abeyance, Mr. Hanson's lawyer stated:

> Given the nature and the scope of today's hearing, I just don't anticipate there being enough evidence upon which the Court can rule on these motions. When I drafted them, I had hoped that I would be able to present expert testimony at the omnibus hearing so that we could have a pre-trial ruling on this, but my efforts to obtain the necessary expert witnesses have been unsuccessful to the extent that they are not here now. I do intend to secure expert testimony for purposes of trial. And I would just, at this time, request that these motions be held in abeyance

(O.T. 13)(emphasis supplied).

Respondent also attempts to mislead this court into concluding that the constitutional challenges involved in this appeal were previously decided in Mr. Hanson's earlier case, State v. Hanson, 364 N.W.2d 786 (Minn. 1985). See Brief for Respondent at 41-43. The only issue addressed in that case, the constitutionality of classifying marijuana as a Schedule I controlled substance, is not even involved in this appeal.

Respondent further misconstrues Mr. Hanson's equal protection challenge as an attack on the legitimacy of this classification in light of the THC Therapeutic Research Act. See id. at 46. That issue was presented in State v. Whitney, 637 P.2d 956 (Wash. 1981), a case upon which respondent relies. Charged with distributing five pounds of marijuana to an undercover agent, Whitney claimed that the retention of marijuana in Schedule I, for purposes other than those recognized in Washington's THC Therapeutic Research Act, rendered Washington's prohibition against marijuana use facially invalid. Id. at 960. Unlike Whitney, Mr. Hanson is not claiming that the enactment of Minnesota's THC Therapeutic Research Act precludes the legitimate retention of marijuana in Schedule I. Mr. Hanson is simply arguing that under the unique circumstances presented in this case, it is unconstitutional to prohibit his medicinal use of marijuana to treat his epilepsy, while at the same time permitting chemotherapy cancer patients to use marijuana to obtain relief from mere nausea and vomiting.

VI. Conclusion

For the reasons discussed in both this reply brief and appellant's original brief, Gordon Hanson respectfully requests this court to reverse his convictions for growing and possessing marijuana and direct that he be discharged.

Respectfully submitted,

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Dated: November 30, 1990

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9/12/90

To: Legal Representative and or
court services

Re: Chart Review, Gordon Hanson

Dear Sirs,

Mr. Hanson is a 52 year old caucasian male who has been seen by a number of physicians in the Warroad Clinic since 1965 (a period of in excess of 25 years). He has a long documented record of seizure disorder including both petie mal and grand mal seizure activity. He has been sent to outside specialists on multiple occasions and has been on multiple medications of both standard and exotic varieties. He has a long history of non-compliance on medications and most of this problem seems to stem from an inability to tolerate the side effects of various medications.

Most recently, I have had the opportunity to discuss with him several exotic medications which were apparently recommended by "experts" during some legal proceedings. The first was Tegratol. I have some experience with this medication and have several patients who have been on it for years without adverse reaction. Tegratol is quite popular with the neurological people in Grand Forks, however it is not popular with me as I end up being the one who has to deal with the adverse reactions. Tegratol has a high incidence of associated agranulocytosis (the blood forming cells get wiped out and the condition is often fatal). Mr. Hanson also has a prior history of yellow jaundice and since Tegretol is know to be associated with liver dysfunction, Tegretol would not be considered to control Mr. Hanson's seizures. Depakote was also discussed and dismissed out of hand for the same reason (known association with liver toxicity). Livers with a prior history of insult by hepatitis are more prone to injury by drugs and exhibit liver enzyme abnormalities sooner in the course of therapy.

Most recently, Mr. Hanson has been complient on dilantin and myscoline and at his repeated request Prozac, an antidepressant has been added to counteract the depressed state which results from his compliance. I personally don't like this new drug Prozac, even though there are glowing reports of its success in the treatment of many types of depression, there are some alarming statistics about an association with suicidal thoughts,intent, and action. Even the news media has been reportin this association on the CNN and local news. I won't feel comfortable using this medication until all the data is in and I am always uncomfortabl when my patients insist on being the trial balloon.

Respectfully submitted,
Steve McKenzie DO
Warroad Clinic

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